FOR ARGUMENT

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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-285

STATE OF CALIFORNIA, et al.,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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SUMMARY OF ARGUMENT

I.

In *Nebraska v. Wyoming,* 295 U.S. 40 (1935), and *Nebraska v. Wyoming,* 325 U.S. 589 (1945), this Court held that the Secretary of the Interior "must obtain permits and priorities for the use of water from the State of Wyoming in the same manner as a private appropriator," and that the Secretary, in complying with state regulatory water laws, was in "compliance with that directive [in section 8 of the Reclamation Act of 1902]."

In *Ivanhoe Irrig. Dist. v. McCracken,* 357 U.S. 275 (1958), *City of Fresno v. California,* 372 U.S. 627 (1963), and *Arizona v. California,* 373 U.S. 546 (1963), this Court

was called on to determine whether section 8 enables a state to contravene specific, identifiable reclamation policies established by Congress, a result which would enable the states to exercise a "veto power" over federal projects. The Court rejected the proposition that section 8 has this effect. In *Ivanhoe,* it held that state law could not override the historic, fundamental acreage limitation in section 5 of the Reclamation Act of 1902. In *Fresno,* it held that state law could not prevent the Secretary of the Interior from acquiring water which is the subject of private vested rights, under his condemnation powers in section 7 of the act; it also held that state law could not override the specific preference for water for irrigation uses found in the federal reclamation laws.

In *Arizona,* the Court held that sections 14 and 18 of the Boulder Canyon Project Act (BCPA), an act which provides for a series of reclamation projects that utilize the waters of many states, do not authorize the states to control federal water uses under the BCPA. This case is fundamentally different from the *Arizona* case, because the legislative history of the Reclamation Act of 1902 is fundamentally different from that of the BCPA. The legislative history of the BCPA indicates that Congress meant to provide for unitary federal control because of the interstate nature of the BCPA. However, the legislative history of the Reclamation Act of 1902 indicates that Congress solved the interstate problem under that act, by authorizing a state only to control the use of water destined for use in that state, regardless of where such water may arise.

In *First Iowa Hydro-Electric Cooperative v. Federal Power Commission,* 328 U.S. 152 (1946), this Court again rejected the state "veto power" theory, holding that sections 9(b) and 27 of the Federal Power Act do not authorize a state to prevent the construction, maintenance and operation of a power project licensed by federal officials under that act.

Thus, these cases merely hold that the states cannot contravene specific, identifiable congressional policies, and thus exercise a "veto power" over federal projects. They do not hold that, where state laws do not have that effect, state law is ineffective under section 8. In *Ivanhoe,* the Court expressly reached its decision "without passing generally on the coverage of § 8 in the delicate area of federal-state relations." 357 U.S. at 292. The United States relies on the *dictum,* not the holdings, of *Ivanhoe* and its progeny. If that dictum is construed as rejecting the state "veto power" argument, it is correct. If it is construed more broadly, it is inconsistent with the legislative history of section 8, and is wrong.

II.

The United States argues, on the one hand, that section 8 has no relevance to unappropriated water under the Reclamation Act of 1902, and thus does not require the Secretary to comply with state regulatory water laws; it argues that the Secretary complies with such laws only as a matter of "comity." If this is so, Congress would have inadvertently failed to provide a method for federal appropriation of unappropriated waters that were traditionally controlled by the states, and would thus have impaired the states' ability to quantify and manage their unappropriated waters. Moreover, the legislative history of section 8 clearly indicates that the Secretary must comply with state law in acquiring his water rights under the act.

The United States concedes that the legislative history "provides some support" for the proposition that the Secretary must comply with state water laws, and thus that

he does not do so as a matter of "comity." However, the United States argues that the legislative history might be construed as requiring the Secretary only to comply with the "forms" of state law, which the United States defines as including all state laws other than those that provide for regulatory control of water. This argument assumes a distinction that does not exist; the very purpose of the "forms" of state law is to provide for state regulatory control of water.

Moreover, the United States' argument is inconsistent with the legislative history of section 8. The United States argues that the section was amended, prior to its consideration in the House of Representatives, to provide for federal rather than state control of water. However, the purpose of the amendment was only to limit state control of interstate waters, not to otherwise transfer control from the states to the federal government. Indeed, in the debates in the House of Representatives *after* the amendment was made, several congressmen stressed that, even under the amended version of section 8, "distribution should be . . . regulated and controlled by state boards of engineers," "the appropriation and use of the water is under the State law," "Section 8 follows the well-established precedent in national legislation of recognizing local and State laws relative to the appropriation and distribution of water, and instructs the Secretary of the Interior in carrying out the provisions of the act to conform to these laws," and so forth. These and other statements, which belie the United States' "form" argument, were ignored in the United States' brief.

Section 8, in providing for state control of waters "used in irrigation," reflects the fact that the Reclamation Act of 1902 was intended only to provide works for "irrigation"

purposes. Subsequent congressional acts provided that the works could also be used for non-irrigation purposes, and the legislative history of the acts indicate that the provision of state control in section 8 was to apply to all project purposes, not just the irrigation purpose.

III.

Section 8 establishes a fundamental, historic principle of federal reclamation law, the principle of state control of water uses. The section literally imposes no limits on the scope of that principle. However, Congress has established other substantive policies in the field of reclamation law, in the Reclamation Act of 1902 and in supplementary laws adopted thereafter. A proper balance of these competing policies would limit the principle of state control to the extent that it is in conflict with other specific, substantive reclamation policies adopted by Congress, but would preserve the principle of state control to the extent that no such conflict exists. Applied here, a proper balance of these policies would allow California to control water uses of the New Melones Project, to the extent that California law does not impair the specific, basic purposes of the project or render it economically infeasible.

The United States argues that supplementary reclamation laws enacted by Congress in 1911, 1914, 1920 and 1939 provide a comprehensive reclamation scheme that vests the Secretary with exclusive discretionary control of water uses, thus leaving no room for state control of such uses. It argues, in effect, that section 8 has been repealed by implication. However, this Court frowns on repeals by implication. Moreover, these supplementary laws merely establish specific congressional policies that cannot be contravened by the states; nothing in the laws suggests an intent to nullify state laws which do not conflict with these

congressional policies. To the contrary, Congress consistently reaffirmed the principle of state control in these acts, and in other acts as well.

The United States argues that our view is "unworkable," because federal reclamation projects can be "efficiently" operated only under unitary federal control. It argues that our view will lead to increased litigation, that it will require the courts to determine which congressional policies are deemed to override state law, and so forth. In fact, our view is consistent with that which has been followed in historical practice. The Secretary has *consistently,* and *fully,* complied with state water laws, including those that provide for regulatory control of water. Even today, his regulations provide that "project plans must comply with State legal provisions or priorities for beneficial use of water." To argue, at this late date, that our view is "unworkable" is to argue that the entire federal reclamation program has been, since its inception, an historical failure.

Moreover, in enacting section 8, Congress clearly rejected the concept of unitary federal control. It apparently believed that this interest was outweighed by the interest of continuing and extending the tradition of state control of water, a tradition that had been approved by Congress in the acts of 1866, 1870 and 1877. It thus recognized that the states should be allowed to control the use of water that, under the act, was to be made available for local economic and municipal interests, and thus that would affect the pattern of economic growth in the states. Indeed, it would be anomalous to exempt the distribution of water under the act from state control, since such water is distributed to the same local economic and municipal interests that are otherwise subject to state control. Thus, Congress weighed competing interests in enacting the Reclamation

Act of 1902, and reached an accommodation of those interests which it believed to be protective of both national and local interests. The United States asks this Court to reweigh these interests, and overturn this accommodation.

The United States argues that, since the states are allowed to participate in the planning of federal projects, it would be "pointless" to allow them to control federal water uses after the projects are authorized. However, Congress cannot foresee all potential problems and concerns that may arise from its authorizing acts, and normally fails to make provision for all such problems and concerns. These problems and concerns typically involve matters of local rather than concern. Thus, there is no discernible national interest that precludes the states from developing their own reclamation schemes, in order to complement the congressional scheme. Indeed, this case provides an example of how California provided a balanced solution to a problem that was not anticipated by Congress. In authorizing the New Melones Project, Congress intended that the irrigation and power benefits would be made available for the East Side Division, a proposed addition to the Central Valley Project. However, Congress has apparently abandoned plans to build the East Side Division, and thus the congressional scheme for water use cannot be fulfilled. The Secretary has, to date, failed to develop an alternative plan for water use. Congress did not foresee these unusual circumstances. Thus, the State Board, applying traditional principles of western water law, deferred the Secretary's right to impound water for consumptive use until he develops a plan for its use. Rather than rendering the planning procedures "pointless," the State Board's decision bridges a gap that could not have been foreseen in the planning process.

IV.

Assuming that the doctrine of finality of judgments does not bar the United States from collaterally attacking the validity of the conditions of Decision 1422, the conditions are fully consistent with the purposes of the New Melones Project. The major conditions, Nos. 1 and 2, defer impoundment of water for consumptive use until the Secretary develops a plan for such use, and submits the plan to the State Board for approval. The United States does not argue that the conditions frustrate the congressional scheme for water use; it cannot make that argument, since the congressional scheme provides for distribution of water to the since-abandoned East Side Division. The United States does not argue that the conditions frustrate the Secretary's own scheme for water use; it cannot make that argument, since the Secretary has no such plan. Instead, the United States argues that the conditions "undermine the project's economic feasibility," by deferring full impoundment. However, it is the Secretary's failure to develop a plan for water use, not the conditions that defer his impoundment rights until he develops such a plan, that threatens to defer realization of the full benefits of the project. The United States was closer to the truth when it advised this Court in another case that the conditions of Decision 1422 do not "fundamentally alter its [the project's] value."

The United States argues that the conditions, in enabling the State Board to weigh the "benefits" and "damage" of the Secretary's future water use plan, may enable the State Board to frustrate project purposes at a future time, by denying water which is necessary to serve the congressionally-authorized purposes of the project. However, we concede that the State Board cannot, now or in

the future, deny water which is necessary to serve those purposes. Whether the State Board may act in contravention of that limitation cannot be determined here, but can only be determined when the State Board acts in response to the Secretary's future water plan.

The remainder of the conditions of Decision 1422 are minor, in that they merely require preferences for water uses that are already contained in the authorizing act, adopt the Secretary's own estimates of water needs, reserve jurisdiction to the State Board to impose new conditions on the basis of new facts, and so forth. These conditions do not substantially affect the way that the Secretary plans to operate the project, much less conflict with any congressionally-authorized purposes of the project.

The United States argues that Congress, in authorizing individual reclamation projects, provides a comprehensive reclamation scheme that vests the Secretary with absolute, exclusive discretion over water uses, and thus leaves no room for state control of water uses. The United States does not argue that state law in this case impairs his specific duties under the act. That is, the United States does not argue that the conditions forbid him to do an act that is mandated by the authorizing act, or mandate him to do an act that is forbidden by the authorizing act. Rather, it argues that the Secretary has exclusive discretion over water uses, and thus can override state water laws whenever he chooses to do so.

Under this view, section 8 would have no practical meaning or effect, because the section would never be applicable to individual projects authorized by Congress. Thus, in the final analysis, the United States asks this Court to judicially overturn a fundamental, historic principle of federal

reclamation law, the principle of state control in section 8. If that principle is to be overturned, such is the task of Congress, not this Court.

V.

Under the doctrine of finality of judgments, the United States cannot collaterally attack the validity of a prior decision, if the court or agency in the prior case had general jurisdiction to issue the decision. Therefore, the United States cannot collaterally attack the validity of the conditions of Decision 1422, but can only challenge the general jurisdiction of the State Board to impose conditions. If the result were otherwise, the United States would always be free to collaterally attack the validity of conditions, whenever it no longer wished to be bound by them. Under that result, the purpose of the doctrine of finality, which is to vest prior legal proceedings with certainty, would be subverted.

VI.

If the United States acquires its water rights under state law as a matter of "comity," it has the power to make an election as to whether or not to acquire its rights under state law. If it thus elects to acquire its rights under state law, it should be required to take both the benefits and burdens of state law, and thus should be required to comply with conditions in its permits.

VII.

When the Secretary acquires an assignment of state-filed permit applications, he receives a right that, however inchoate, has the benefit of an early priority date. If he elects to receive the benefit, he should be bound by conditions which the state attaches to the right.

ARGUMENT

Introduction

In our view, the easy question in this case is whether Congress provided for state control of water under the Reclamation Act of 1902; section 8 clearly establishes the fundamental principle of state control. The difficult question arises in reconciling the principle of state control with other substantive principles of federal reclamation law established by Congress, a difficulty which arises from the fact that section 8 does not specifically address the question. The United States argues, in essence, that the difficulties in reconciling these principles justifies the conclusion that the Secretary of the Interior should have absolute, exclusive discretionary control of water uses, a result which would result in the judicial abrogation of the fundamental principle of state control.

As we shall see, a proper interpretation of section 8 would apply the principle of state control only to the extent that the result does not impair Congress' other specific, substantive policies in the field of reclamation. These substantive policies can be fully preserved without the Secretary having exclusive control over water uses, and thus without abrogating the principle of state control. This result thus balances and harmonizes the fundamental principle of state control with other fundamental principles of federal reclamation law, rather than nullifies one principle in order to serve the others. Far from making Congress' reclamation goals unattainable, this result is that which has been followed in actual, historical practice under the federal reclamation program.

I. THE UNITED STATES HAS MISCONSTRUED PRIOR DECISIONS OF THIS COURT THAT INTERPRET SECTION 8.

The United States argues that this Court, in *Nebraska v. Wyoming*, 295 U.S. 40 (1935), and *Nebraska v. Wyoming*,

325 U.S. 545 (1945), failed to consider the meaning of section 8. U.S. Br. 38-40. It further argues that the Court subsequently interpreted the meaning of the section adversely to our position, in *Ivanhoe Irrig. Dist. v. McCracken,* 357 U.S. 275 (1958), *City of Fresno v. California,* 372 U.S. 627 (1963), and *Arizona v. California,* 373 U.S. 546 (1963). Neither the Ninth Circuit nor the district court, in the proceedings below, viewed the latter decisions as controlling here. Indeed, the decisions support the view, which we urge, that section 8 should not be construed as authorizing the states to exercise a "veto power" over federal projects.

In its decision in the 1935 *Nebraska* case, this Court stated:

> "The bill alleges, and we know as a matter of law [citing section 8 of the Reclamation Act of 1902], that the Secretary and his agents, acting by authority of the Reclamation Act and supplementary legislation, must obtain permits and priorities for the use of water from the State of Wyoming in the same manner as a private appropriator . . . ." 295 U.S. at 43.

The United States seeks to obviate the effect of this decision by stating that it "does not here challenge the proposition that the Secretary 'must obtain permits and priorities for the use of water from the state . . . .'" U.S. Br. 41 n. 20. It fails to note, however, that it challenged that very proposition in its prayer for relief in this case. App. I, 19. See note 7, *infra.* It further fails to note that this proposition is at war with its argument that it acquires its water rights under state law as a matter of "comity," rather than under the directive of section 8.

In the 1945 *Nebraska* case, the Secretary had acquired appropriative permits from the State of Wyoming, which

were subject to several conditions imposed by Wyoming officials. 325 U.S. at 613. The United States' contracts with its customers provided that "after the stored water was released from the reservoir it was under the control of the appropriate state officials." *Ibid.* The Court stated that, under these circumstances:

> "We have then a direction by Congress to the Secretary of the Interior to proceed in conformity with state law in appropriating water for irrigation purposes. We have a compliance with that directive." *Id.* at 614-615.

The United States contends that the Court did not mean to consider the effect of section 8, and that the Court meant to avoid the question because the Secretary had in fact complied with state law. U.S. Br. 39. However, as noted in our opening brief, the question which the Court avoided was the *constitutional* question whether, in the absence of section 8, the Secretary could acquire his water rights independently of state law because of federal "ownership" of water. Pet. Br. 49 n. 37. The Court did not avoid the *statutory* question whether section 8 required him to acquire his water rights under state law. *Ibid.* The United States' argument, that the Court failed to consider the statutory meaning of section 8, is inconsistent with the Court's statement that "we have a compliance with that directive [in section 8]." 325 U.S. at 614-615.

Turning to *Ivanhoe, Fresno* and *Arizona,* it is helpful to understand the historical context in which those cases arose. The view had been urged, for many years prior to *Ivanhoe,* that section 8 vests the states with a broad "veto power" over federal projects authorized by Congress. See generally Trelease, "Reclamation Water Rights," 32 *Rocky Mtn. L. Rev.* 464, 467-468 (1960); Sax, "Problems of Federalism in

Reclamation Law," 37 *Univ. of Colo. L. Rev.* 49, 62-69 (1964). Under this view, the states would have the right to alter project purposes, or even deny water to the project altogether, whenever the state deemed such to be in the public interest. *Ibid.* It was argued that, since section 8 literally imposes no limits on state control, none should be implied. *Ibid.* Under this view, the states would have the right to nullify the federal reclamation investment, whenever the state regarded that investment as unsound or unwise. This was, in essence, the view that was urged on this Court in the *Ivanhoe, Fresno* and *Arizona* cases.

The Court properly responded that, where there is a clash between specific federal and state policies, the state policy must yield, notwithstanding section 8. It reaffirmed the proposition, voiced in the 1945 *Nebraska* decision, that, "where *Congress* has provided a system of regulation for federal projects, it must [not] give way before an inconsistent state system." 325 U.S. at 615. (Emphasis added.) Thus, in *Ivanhoe,* following the view urged by *both* the United States and California,[1] the Court rejected the proposition that section 8 enables a state to override the "specific and mandatory" acreage limitation in section 5 of the Reclamation Act of 1902, a limitation that has represented "national policy for over half a century." *Id.* at 291-292. In *Fresno,* the Court rejected the proposition that a state can prevent the Secretary from acquiring water under his condemnation powers, as found in section 7 of the Reclamation Act of 1902; it further rejected the proposition that a state can override the specific provision, found in section 9(c) of the Reclamation Project Act of 1939, 53 Stat. 1194, as amended 43 U.S.C. § 485h(c), that requires a preference for

1. Thus, the Court stated that "there is no clash here between the United States and the State of California." 357 U.S. at 279.

water for irrigation purposes over municipal purposes. 372 U.S. at 629-630.[2]

In *Arizona,* without focusing on any specific state law, the Court rejected the proposition that sections 14 and 18 of the Boulder Canyon Project Act (BCPA), 45 Stat. 1057, 43 U.S.C. §§ 617m, 617q, enable the states to exercise *unlimited* control over federal water uses, which would have enabled the states to exercise a veto power over the BCPA. 373 U.S. at 579-585; Pet. Br. 53 n. 40. Any other result would have potentially frustrated the purposes of the BCPA, for Arizona's opposition to the BCPA was well known, and had been expressed to this Court. See *United States v. Arizona,* 295 U.S. 174 (1935). Against that historical backdrop, this Court responded that the legislative history of the BCPA evinced a clear congressional intent to provide for absolute federal control of water, and that, in light of the interstate nature of the project, any other result may subject the project to the "varying, possibly inconsistent commands of different state legislatures." 373 U.S. at 589-590. However, the legislative history of the Reclamation Act of 1902, which was not examined by the Court, is entirely different from the legislative history of the BCPA. Moreover, the BCPA is fundamentally different from the vast majority of projects authorized under the Reclamation Act of 1902, since 85% of the latter projects serve users

2. The United States also argues that our position is inconsistent with the decision in *Turner v. Kings River Cons. Dist.,* 360 F.2d 184 (9th Cir. 1966). U.S. Br. 56 n. 33. There, the Ninth Circuit held that state law cannot prevent the Secretary from acquiring water already appropriated by others, under his condemnation powers in § 7 of the Reclamation Act of 1902. Thus, the decision is similar to that in *Fresno,* and in fact relied on the *Fresno* analysis. Indeed, the Secretary was not even required to obtain an appropriative permit under California law in that case, since California law requires such a permit only where an applicant seeks *unappropriated* waters. Cal. Wat. Code § 1375.

within a single state. See Sax, "Problems of Federalism in Reclamation Law," 37 *Univ. of Colo. L. Rev.* 49, 56 (1964). Thus, the potential problem of interstate conflicts does not exist with respect to most projects authorized under the latter act. To the extent that the problem might exist, Congress solved the problem in 1902 by amending section 8 to allow a state only to control water which, under interstate compacts or interstate stream adjudications, is destined for use in that particular state, regardless of where the water may arise. See page 30, *infra.*

Prior to *Ivanhoe,* the state "veto power" argument had been raised, and rejected, in another context. In *First Iowa Hydro-Electric Cooperative v. FPC,* 328 U.S. 152 (1946), the State of Iowa argued that sections 9(b) and 27 of the Federal Power Act (FPA), 41 Stat. 1063, 1068, 1076 (1920), 16 U.S.C. §§ 791a, 802(b), 821, which contain language analogous to section 8 of the Reclamation Act of 1902,[3] authorized Iowa to license the construction and operation of a power project regulated under the FPA. Iowa law provided that "no dam shall be constructed, maintained, or operated" in Iowa without a license issued by Iowa authorities. 328 U.S. at 164, 165, 166. Accordingly, Iowa maintained that it had a "veto power" over the construction, maintenance and operation of the project, *id.* at 164, notwithstanding that Congress had authorized federal authorities to license the construction, maintenance and operation of the project. The case thus raised the question whether a state could veto a project that had been authorized by Congress, and did not involve water rights at all; in fact, the licensee had already acquired "options upon 98% of the riparian rights" in the portion of the river

3. However, §§ 9(b) and 27, unlike § 8, do not require the Secretary to "proceed in conformity with" state laws.

affected by diversions for the project. *Id.* at 158. The Court properly rejected Iowa's argument, ruling that the federal government has exclusive authority to license the construction and operation of such projects. The analogous argument, applied here, would be that section 8 authorizes the State Board to exercise a veto power over the construction, maintenance and operation of the New Melones Project. It is clear that the State Board does not have such power, nor do we argue otherwise. This Court properly refrained from relying on *First Iowa* in its subsequent consideration of section 8 in *Ivanhoe* and *Fresno,* and should also refrain from doing so here.

Thus, *Ivanhoe, Fresno, Arizona* and *First Iowa* rejected the argument, which we do not urge, that the states have the power to veto federal projects.[4] These cases did not consider the more difficult question, raised here, whether the Secretary must comply with state water laws, where there is no conflict between specific state and congressionally-defined policies. In fact, the Court in *Ivanhoe* expressly avoided "passing generally on the coverage of § 8 in the delicate area of federal-state relations in the irrigation field." 375 U.S. at 292.

The United States relies on the *Ivanhoe* dictum that "we read nothing in § 8 that compels the United States to deliver water on conditions imposed by the State." 357 U.S. at 292. This dictum was repeated in *Fresno* and

4. The United States argues that some of the conditions of Decision 1422 enable the State Board to adopt *future* conditions that may effectively frustrate, and thus potentially veto, the congressional aims for the New Melones Project. U.S. Br. 66, 75-78. As we note later, we do not construe any such condition as having that effect. See pages 54-55, *infra.* If any condition is construed as having that effect, it would be overly broad. However, it is premature to determine whether any future condition might have that effect, since that determination can only be made when, and if, such future conditions are imposed.

Arizona. 372 U.S. at 630; 373 U.S. at 586. The dictum was, of course, unnecessary to the decisions. Even so, the dictum is consistent with our views, if the dictum is construed as rejecting the theory that the states have a veto power over federal projects. If the dictum is not so construed, it is inconsistent with the legislative history of section 8; indeed, none of the decisions even referred to that legislative history. As Dean Meyers points out in his amicus brief, "From an easy case that made good law, . . . this Court has pushed the *dictum* of *Ivanhoe* to the point that Section 8 has no meaning at all." Amicus Curiae Brief of Charles J. Meyers, 12.

II. THE UNITED STATES MISINTERPRETS THE MEANING OF SECTION 8, AS REVEALED BY ITS LANGUAGE, LEGISLATIVE HISTORY AND ADMINISTRATIVE PRACTICE AND INTERPRETATION.

A. The United States' "Comity" and "Form" Arguments.

The United States argues that section 8 has two limited effects, neither of which requires the Secretary to acquire his water rights under state law. U.S. Br. 129-133. First, the section merely "reaffirms" the doctrine that the western states are free to apply their water laws to private appropriators, with respect to waters other than those acquired under the 1902 act. *Ibid*. Second, the section requires the Secretary to pay compensation to private water users whose vested rights, as defined by state law, are condemned by the Secretary under section 7 of the 1902 act. *Ibid*.

Under this view, section 8 would have no relevance to unappropriated water acquired under the 1902 act. To the extent that the section "reaffirms" the states' authority to control the use of non-project waters by private users, the section would have no relevance to *any* water acquired

under the act.[5] To the extent that the section provides that state law defines the vested rights which are condemned by the Secretary under section 7, the section would have relevance only to water already appropriated by others; it would have no relevance to *unappropriated* water. Under the United States' analysis, section 8 would impose no obligation on the Secretary to comply with state law in acquiring unappropriated water. He would comply with state law only as a matter of "comity." U.S. Br. 141.

The United States' "comity" argument creates conceptual and practical difficulties, which the United States has yet to address. Under its view, Congress would have provided a method for the federal acquisition of waters already appropriated by others, but would have failed to provide a method for the federal acquisition of unappropriated waters. Accordingly, Congress would have failed to provide a method for administrative quantification of the federal water right, thus impairing the states' ability to manage and allocate their unappropriated waters even among private appropriators. Pet. Br. 43-45. It can hardly be imagined that Congress overlooked a major concern of the federal reclamation program, which is how the Secretary acquires unappropriated waters that were traditionally controlled by the states.[6]

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5. If § 8 merely "reaffirms" the states' authority to apply their water laws to private appropriators, it would add nothing to the fabric of federal law. This Court has held, in *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142 (1935), that the congressional acts of 1866, 1870 and 1877 already provide the same authority to the states. The United States notes that this matter was not always free from doubt. U.S. Br. 130. However, it is difficult to understand why Congress, in an act intended to provide for storage and use of water for reclamation purposes, would insert a provision in the act that has nothing to do with such water.

6. The specific language of § 8 indicates that Congress did not overlook this concern. The section, in describing the Secretary's obligation to "proceed in conformity with" state laws, refers to

Aside from state law, the federal reserved rights doctrine provides the only method of which we are aware for the federal acquisition of unappropriated water, where Congress has failed to expressly provide for a federal right. See, *e.g., Cappaert v. United States,* 426 U.S. 128, 138-142 (1976). However, the United States properly concedes that it lacks a reserved right, at least with respect to the New Melones Project. U.S. Br. 21 n. 17. If the Secretary lacks a reserved right, he stands in the same shoes as private appropriators, who must acquire their rights under state law. *California Oregon Power Co. v. Beaver Portland Cement Co.,* 295 U.S. 142 (1935). Thus, the United States fails to answer the basic question which it has ignored in this litigation, What is the source and nature of the federal right? Either the Secretary acquires his rights under the reserved rights doctrine, or he acquires his rights under state law. The United States concedes that the Secretary does not acquire his rights under the former theory, and denies that he acquires his rights under the latter. Thus, the United seeks the judicial creation of a new theory of water law, one that it has failed to define.

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state laws relating to the "control, appropriation, use, or distribution" of water, *"or with any vested right thereunder."* (Emphasis added.) The latter, emphasized reference was intended to protect vested rights. However, since that reference is disjunctive, it is clear that the earlier reference—to state laws relating to the "control, appropriation, use, or distribution" of water—is not limited to vested rights, if it includes vested rights at all.

The United States cites a statement of Congressman Martin during the 1902 congressional debates, in which Martin indicated that § 8 requires the Secretary, when condemning vested rights under § 7, to "proceed in conformity with" state laws. 35 Cong. Rec. 6759; U.S. Br. 133. Martin's statement merely indicates that the Secretary must recognize rights vested under state law, and does not support the United States' argument that the Secretary is free to ignore state law in acquiring unappropriated water independently of § 7.

Because of the difficulties of its "comity" argument, the United States concedes that section 8 may require the Secretary to comply with state law in acquiring unappropriated water. U.S. Br. 137.[7] However, it argues that the section only requires the Secretary to comply with the "forms" of state law, which, as defined by the United States, consist of all state laws other than those that result in regulatory control of water. *Ibid.*

The difficulty with the United States' "form" argument is that it improperly assumes that the "form" of state appropriation laws can be divorced from state regulatory control of water; it thus assumes a distinction that does not exist. As noted in our opening brief, the appropriation doctrine was developed in the western states to provide for state control of the "beneficial use" of water, a matter of vital importance in the water-scarce western states; by thus controlling the "beneficial use" of water, the states were able to allocate and manage their limited water resource. Pet. Br. 31-34.[8] Thus, to argue that the Secretary is only subject

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7. Since the United States concedes that the Secretary must at least comply with the "form" of state law, there is no basis for its suggestion that this Court should refrain from considering whether he is required to do so. See U.S. Br. 20. Indeed, the United States requested a judicial resolution of that very question in its complaint for declaratory relief, App. I, 19, and the lower court, responding to the United States' request, resolved the question against the United States. Since the United States is responsible for this issue now being before this Court, the United States should not be heard to argue that the issue should not be further considered.

8. In discussing the appropriation doctrine in *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 154 (1935), the Court stated:

> "[T]he right to the use of waters for mining and other *beneficial purposes* in California and the arid region generally was fixed and *regulated* by local rules and customs. . . . The rule generally recognized throughout the states and territories of the arid region was that the acquisition of water by prior appropriation for a *beneficial use* was entitled to protection;

> and the rule applied whether the water was diverted for manufacturing, irrigation, or mining purposes. The rule was evidenced not alone by legislation and judicial decision, but by local and customary laws and usage as well." (Emphasis added.)

The Pyramid Lake Tribe of Indians (hereinafter "amicus tribe"), analyzing history differently from this Court's analysis in the *Beaver Portland* case, argues that the western states did not traditionally determine beneficial use in granting water rights, but instead ministerially granted such rights if unappropriated water was available. Amicus Tribe Br. 11-12. Its argument distorts history. According to Wiel, Wyoming was the pioneer state to develop an administrative permit system as the basis for granting water rights; by 1911, this system had also been adopted in Idaho, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Utah and, in part, by Colorado. 1 Wiel, *Water Rights in the Western States* 435 (3d ed. 1911) (hereinafter "Wiel"). Under this system, a permit could be denied by a state engineer if the applicant failed to show that his proposed use was beneficial, and was in the public interest. *Id.* at 439-440, 442, 444; 2 Wiel 1557-1558. In some states, the permit provided for alteration of the natural flow of a river, when necessary to provide for the most beneficial use of water. 1 Wiel 439-440. Permit applications could be, and were, opposed by those who claimed that the proposed use was not in the public interest, and that the protestant had an alternative plan that was more in the public interest. *Id.* at 442. Permit applications were frequently rejected, particularly by the States of New Mexico and Nebraska, if the applicant was unable to show that his proposed use was in the public interest. *Id.* at 444-445, 446. Although the tribe states that Wiel characterized the powers of state engineers as "ministerial," Amicus Tribe Br. 11 n. 14, Wiel makes clear that their power was ministerial only in the sense that it was subject to judicial review. *Id.* at 436. On balance, the permit system formed "the basis of the water code system" of the western states, and established "the principle of centralized public control and regulation." 2 Wiel 1096.

The tribe also points out, as we indicated in our opening brief, that the permit system has not been adopted in all western states, in that Colorado and Montana utilize a judicial rather than an administrative system for the acquisition of water rights. Amicus Tribe Br. 12 n. 14; Pet. Br. 33 n. 25. That the water laws of all western states are not precisely uniform, and have developed in response to different local conditions, is as irrelevant as it is unsurprising. The tribe also points out that, at the time of the passage of the Reclamation Act of 1902, the water laws of the western states were not as "highly developed" as they are today. Amicus Tribe Br. 12 n. 14. This observation suggests only that the states' water laws are better able to protect the beneficial use of water now

to the "form" of state appropriation laws is to suggest that the very purpose of those laws—to provide for state control of water allocations— cannot be fulfilled. Stated differently, most western states developed a permit system as the basis of their appropriation laws. *Ibid.* Under these systems, a permit is issued subject to conditions which the state imposes to protect the "beneficial use" of water; thus, the permit, as limited by conditions, constitutes a states' recognition that water is being used in the public interest. To suggest that a state must issue a permit, but cannot impose conditions to protect the "beneficial use" of water, is to defeat the very purpose of the permit system. Thus, the result urged by the United States is little more than an empty formalism, one that denies a state's traditional power to fix duties to the rights which it grants.

B. Language of Section 8.

The United States' "comity" and "form" arguments are inconsistent with the language of section 8. The section requires the Secretary to "proceed in conformity with" the "appropriation" laws of the western states. The section thus requires the Secretary to satisfy the state that his proposed water uses are consistent with the "beneficial use" of water, and thus subjects his rights to state regulatory control. Thus, within the limitations described more fully later, see pages 57-61, *infra*, the states exercise the same regulatory control over the federal water right that they exercise over other water rights. This result is confirmed by the language in section 8 that specifically subjects the Secretary's rights to state laws relating to "control" of the "use" and "distribution" of water. Thus, the section pro-

than before, and that Congress was thus justified in its expectation that § 8 would lead to the development of a more "perfect" system of water laws in the western states. See, *e.g.*, H.R. Rep. No. 1468, 57th Cong., 1st Sess. 7 (1902).

vides no basis for an argument that the Secretary complies with state law as a matter of "comity," or that he need only comply with the "form" of state law.[9]

This result also appears from the proviso in section 8 providing that "beneficial use shall be the basis, the measure, and the limit of the right." Pet. Br. 18. In effect, this

9. Advancing a technical argument that was not raised below, the United States argues that § 8, in providing for state control of water "used in irrigation," does not provide for state control of water used for non-irrigation purposes. U.S. Br. 126. The "irrigation" reference in § 8 reflects the fact that the Reclamation Act of 1902 was enacted to provide for the "construction of irrigation works," 32 Stat. 388 (1902), not non-irrigation works. Congress subsequently amended the act to provide for the use of water for non-irrigation purposes. 41 Stat. 451 (1920), 43 U.S.C. § 521. The legislative history of the latter act indicates that Congress meant to extend the principle of state control, found in § 8, to non-irrigation water. See page 40, *infra*. Thus, when Congress authorizes a project that is to be "operated pursuant to the Federal reclamation laws," as it did with respect to the New Melones Project, 76 Stat. 1191 (1962), it means to provide for state control of water used for all purposes, not just irrigation purposes.

If the result were otherwise, § 8 would have no relevance to non-irrigation uses even under the United States' narrow interpretation of the section. Thus, the Secretary would not even be required to pay compensation for vested rights, as defined by state law, when he acquires such rights by the condemnation process. In *United States v. Gerlach Live Stock Co.*, 339 U.S. 725 (1950), the Court rejected that result, holding that § 8—even as applied to non-irrigation uses of a multiple-purpose project—at least requires the payment of compensation for federal condemnation of vested rights.

Moreover, the United States' argument is contrary to the historical administrative practice under the Reclamation Act of 1902, a practice that is entitled to "great deference" by this Court. See *Udall v. Tallman*, 380 U.S. 1, 16 (1964). The Bureau, in complying with state laws under § 8, Pet. Br. 36-40, has never differentiated between the irrigation and non-irrigation purposes of projects. In California, for instance, it has consistently applied for permits, and complied with conditions therein, relating to *all* project purposes, not just irrigation purposes. See, *e.g.*, Df. Ex. 1, pp. 1-3 (App. II, 3-4); II Engle, "Central Valley Project Documents" 544-545, 547, containing H.R. Doc. No. 246, 85th Cong., 1st Sess. (1957).

Moreover, the United States' argument would lead to an administratively illogical result. If its argument were correct, Congress would have provided a method for the acquisition of water rights

proviso insures that water rights exist under the act only to the extent that they meet the "beneficial use" test. As noted above, the "beneficial use" test is the basis of the states' appropriation laws. In fact, it has no other significance under federal law. At the time that the 1902 act was passed, the water laws of the western states were in a state of transition from the riparian doctrine to the appropriation doctrine. Pet. Br. 31-34. Under the riparian doctrine, a water right is tied to the contiguity of land and water, and, in its common law form, is not subject to state regulatory control. *Ibid.* Under the appropriation doctrine, a water right is tied to a state determination of the "beneficial use" of water, and thus is subject to state regulatory control. *Ibid;* see 1 Wiel 406-412. Congress inserted the proviso in section 8 to encourage the transition from the wasteful riparian doctrine to the efficient appropriation doctrine in the arid western states. It expressed the hope that the proviso would encourage the development of "perfection and uniformity" in western water laws, H.R. Rep. No. 1468, 57th Cong., 1st Sess. 7 (1902), a hope which was largely fulfilled. Pet. Br. 33 n. 25. Thus, the proviso limits state control by giving effect only to state laws based on the "beneficial use" concept, but—more importantly here—provides that state laws based on that concept are the source of water rights under the act.

for irrigation purposes in § 8, but would have inadvertently failed to provide a method for the acquisition of water rights for other purposes. Thus, the procedures for the acquisition of water rights would be different, depending on which project purpose is involved. Moreover, the standard for determining whether the water right should be granted would also be different; water rights for irrigation purposes would be subject to the "beneficial use" test in § 8, see Pet. Br. 19 n. 14, and water rights for other purposes would not be subject to this test. Thus, if a state has authority to determine the "beneficial use" of water for irrigation purposes under § 8, there is little reason to deny its authority to determine the "beneficial use" of water for subsidiary project purposes.

C. Legislative History of Section 8.

The United States' "comity" and "form" arguments are inconsistent with the legislative history of section 8. For instance, Congressman Mondell declared, during the House debate, that the section requires the Secretary "to make the appropriation of the necessary water by giving the notice and complying with the forms of law" of the state. 35 Cong. Rec. 6676. The United States concedes that this statement "provides some support" for rejection of its "comity" argument. U.S. Br. 137. However, it argues that the statement is not inconsistent with its "form" argument. *Ibid.* Without arguing whether the statement can be construed as exempting the Secretary from state regulatory control of water, it is clear from other statements of Congressman Mondell and other congressmen that no such exemption was intended. For instance, Congressman Mondell stated that section 8 "follows the well-established precedent in national legislation of recognizing local and State laws relative to the appropriation and distribution of water, and instructs the Secretary of the Interior in carrying out the provisions of the act to conform to these laws." *Id.* at 6670. Congressman Burkett stated that, under section 8, "distribution should be . . . regulated and controlled by State boards of engineers." 35 Cong. Rec. 6728. Congressman Sutherland stated that "the appropriation and use of the water is under the State law. . . ." *Id.* at 6770.[10] These congressional statements and others, see Pet. Br. 26-29, indicate that Congress

10. A more complete description of the legislative history, as it bears on § 8, appears at pages 23-29 of our opening brief.

The United States acknowledges that President Roosevelt advocated the enactment of a national reclamation bill, under which the "distribution of water, the division of the streams among irrigators, should be left to the settlers themselves in conformity with State laws. . . ." 35 Cong. Rec. 6775; U.S. Br. 125 n. 93. However, the United States argues that the President meant only to indicate that the settlers should control supplementary distribution facilities which are built by the settlers. *Ibid.* Nothing in the President's

meant to subject the Secretary's water rights to state regulatory control, and thus belie the United States' "form" argument. Unable to reconcile its "form" argument with these ample congressional assurances, the United States simply ignores them in its brief.[11]

Instead, the United States notes that several congressmen emphasized that reclamation was an undertaking of "national concern," and thus that Congress should provide for federal construction and operation of the projects. U.S. Br. 118. As noted in our opening brief, these statements were addressed to the question, not relevant here, whether Congress should undertake a national reclamation program, or instead should cede lands to the states so that they could undertake their own programs. Pet. Br. 20-21.[12] The

statement supports this conclusion. It is apparent that the President, who was a Republican, meant to endorse the provision in the Republican party platform for 1900, which encouraged the establishment of a federal reclamation program, "reserving control of the distribution of water for irrigation to the respective States and Territories." Pet. Br. 26.

11. However, the United States cites another statement by Congressman Mondell who, after describing the tradition of state control of water approved by the congressional acts of 1866, 1870 and 1877, stated that it is "deemed wise to continue our policy in this regard." *Id.* at 6679; U.S. Br. 132 n. 101. The United States argues that this statement shows that Congress did not mean to continue the tradition with respect to water acquired under the 1902 act, an argument that is both illogical and inconsistent with the other statements described above.

12. Congressmen Mondell, Reeder and Newlands, in the statements cited by the United States, see U.S. Br. 119, argued only that the states, for financial and other reasons, were not equipped to undertake their own reclamation programs, and thus that the federal government should undertake such programs. Pet. Br. 20-21.

The United States also cites a statement of Congressman Robinson who, speaking in opposition to the reclamation bill, stated that the states would be "governed [from] 2,000 and 3,000 miles away." 35 Cong. Rec. 6671; U.S. Br. 134. However, Robinson was speaking in opposition to the concept that Congress should enter the field of reclamation, and was not addressing the meaning of § 8.

statements do not address the question, raised here, whether the Secretary must comply with state law in acquiring and using water under the federal program. Thus, the statements do not bear on the meaning of section 8. The United States apparently suggests that, if the federal government is to build and operate the projects, it need not comply with state laws in acquiring and using water. This conclusion might be logical if Congress had not enacted section 8. In enacting that section, Congress apparently believed that the interest of providing for unitary federal control of the projects was overridden by the interest of continuing and extending the tradition of state control of water.

The United States concedes that section 8, as passed by the Senate, contained a "strong States' rights provision." U.S. Br. 121. However, the United States argues that, prior to its consideration in the House of Representatives, the section was amended to provide for federal rather than state control of water. *Id.* at 120-126. The amendment was worked out in a meeting between President Theodore Roosevelt and a congressional delegation, the primary purpose of which was to strengthen the anti-monopoly provisions in section 5. Pet. Br. App. 2a n. 1. At the meeting, it was agreed to delete a provision in section 8 providing that state laws "govern and control" water, and substitute therein the provision requiring the Secretary to "proceed in conformity with" state laws. It is difficult to understand how a provision requiring the Secretary to "proceed in conformity with" state law can be construed as providing for federal rather than state control of water. In fact, the debate in the House of Representatives, which occurred *after* the amendment was made, makes clear that section 8 provides for state rather than federal control of water,

and thus that the amendment did not substantially change the effect of the section. Pet. Br. 25-29.

Other indicia support our conclusion. The leading congressional authority on reclamation, Congressman Newlands of Nevada, stated that the amended bill was "identical in its provisions, though differing somewhat in phraseology," with the original bill, and that the amended bill was "absolutely in harmony with the original bill." 35 Cong. Rec. 6673-6674.[13] He further stated that the amended bill was "in harmony with the platforms" of the political parties, *ibid.*, which in turn urged the passage of a national reclamation bill "reserving control of the distribution of water for irrigation to the respective States and Territories." Pet. Br. 26. Further, the House report described the amendment as one of several "minor amendments." H.R. Rep. No. 1468, 57th Cong., 1st Sess. 5 (1902).[14]

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13. The United States argues that Newlands meant only to suggest that the amended bill was harmonious with a bill which Newlands had introduced in the House of Representatives, rather than with the original Senate bill, S. 3057. U.S. Br. 122 n. 91. The United States overlooks the fact that the Newlands bill was identical to the original Senate bill. See H.R. Rep. No. 794, 57th Cong., 1st Sess. 5 (1902). Section 8 of both bills was also identical, in providing that state law would "govern and control" water. *Compare* H.R. Rep. No. 794, 57th Cong., 1st Sess. 17-18 (1902), *with* S. Rep. No. 254, 57th Cong., 1st Sess. 9 (1902). Thus, in stating that the amendment was harmonious with his own bill, Newlands clearly indicated that the amendment was harmonious with the original Senate bill.

14. The United States' interpretation of the legislative history rests primarily on a statement of Congressman Robinson during the congressional debates, and an autobiographical statement of President Roosevelt. U.S. Br. 123. Our analysis of these statements appears in our opening brief, at pages App. 3a-5a. Robinson's statement, delivered in the course of his opposition to § 8, was admittedly based on "newspaper accounts," 35 Cong. Rec. 6670, which suggests that the United States attaches greater weight to a hearsay account of a newspaper article than to the original article itself. See note 16, *infra*. In any event, Robinson's statement sug-

As explained in our opening brief, the purpose of the amendment was merely to limit the authority of an upstream state to control the waters of an interstate river, thus depriving users in a downstream state of a fair share of the waters. Pet. Br. App. 1a-5a.[15] This conclusion is

gested only that the President's intervention resulted in a "blending" of the views favoring federal and state control. *Ibid.*

Moreover, Robinson's statement was immediately repudiated by Congressman Newlands who, unlike Robinson, was a participant in the meeting between the President and the congressional delegation. As noted above, Newlands stated that, "if the gentleman [Robinson] will examine the bill, . . . he will find that it is identical in its provisions, though differing somewhat in the phraseology," with the original bill. 35 Cong. Rec. 6673-6674. The United States argues that Newlands, in repudiating Robinson, meant only to indicate that the anti-monopoly provisions of the amended bill, found in § 5, were harmonious with those of the original bill. U.S. Br. 124 n. 92. The United States is apparently confused by Newlands' statement that the meeting was called for the limited purposes of strengthening those anti-monopoly provisions. Pet. Br. App. 2a n. 1. In fact, Newlands, in repudiating Robinson, was responding directly to Robinson's hearsay statement that the provision for state control had been substantially changed, which is the same hearsay statement that forms the basis of the United States' interpretation of the amendment. By stating that the *entire* amended bill was in harmony with the original bill, 35 Cong. Rec. 6673-6674, Newlands clearly indicated that the provision of state control had not been substantially modified.

President Roosevelt's autobiographical statement, published 18 years after the events described, is sufficiently vague to support the version of either California or the United States, assuming that it is admissible. Pet. Br. 4a-5a.

15. Thus, there is no basis for the United States' argument that § 8 may lead to a conflict between the appropriation laws of different states, where a federal reclamation project utilizes interstate waters. U.S. Br. 90-91. As a result of the amendment, a state can only control the use of water which, as the result of interstate compacts or interstate stream adjudications, is destined for use within the state, regardless of where such waters may arise. Indeed, the hypothetical conflict posed by the United States cannot arise with respect to the vast majority of federal reclamation projects, since, as of 1963, 85% of the projects served users within a single state. See pages 15-16, *supra*. Assuredly such a conflict cannot arise here, since the waters of the Central Valley Project, including the New Melones Project, arise and flow solely in California.

confirmed by a contemporaneous newspaper account of the meeting between the President and the congressional delegation, as follows:

> "Congressmen Sutherland and Mondell strenuously insisted upon the provision for local control remaining in the bill, calling attention to the fact that each of the arid States had passed laws which were the result of years of experience . . .; that these laws were now recognized as controlling the waters, but if the matter were turned over to national control much confusion and friction would result; . . . that inasmuch as it was purely a local matter the people of the various States were in a better position to control the subject than officials in Washington two or three thousand miles away . . . .
>
> "The President substantially acquiesced in this view, but expressed the fear that if the provision that State laws shall control the appropriation of water should remain in the bill, it might be construed as permitting individual States to deny the right of citizens of one State to take water from another, and it was finally agreed that the bill should be so amended as to preclude any construction which would permit any State to deny to the citizens of another State the right to take water from the former into the latter." App. II, 114-115.[16]

16. This account was found in the collected papers of Congressman (later Senator) Newlands of Nevada, at Yale University Library. See Affidavit of Richard C. Jacobs in support of Motion to Augment Record and Request to Take Judicial Notice, 3-4, filed April 6, 1976. Since Newlands was the leader of the congressional delegation which met with President Roosevelt, there is a strong likelihood that the account maintained in his collected papers contains an accurate description of the meeting. Indeed, the account is consistent with Newlands' subsequent remarks, during the House debate, that the amended bill was "identical in its provisions, though differing somewhat in phraseology," with the original bill, and that the amended bill was "absolutely in harmony with the original bill." 35 Cong. Rec. 6673-6674. The Ninth Circuit originally denied our motion to have the newspaper account included

D. Administrative Interpretation of Section 8.

The United States argues that its position is not inconsistent with the Secretary's administrative interpretation and practice under the Reclamation Act of 1902. U.S. Br. 138. Its argument is internally inconsistent. On the one hand, it argues that the administrative practice supports its view that the Secretary must only comply with the "forms" of state law. U.S. Br. 140. On the other hand, it argues that the administrative practice supports its view that the Secretary need only comply with state law as a matter of "comity." U.S. Br. 141. In fact, the Secretary's practice supports neither argument. The Secretary has *consistently,* and *fully,* complied with state regulatory water laws, and the United States does not argue otherwise.[17] For instance, the Secretary has consistently acquired appropriative permits under California law, and has consistently complied with conditions in the permits. See Pet. Br. 36. The United States suggests only that the Secretary's historic compliance with state law was not pursuant to the directive in section 8, but was pursuant to "comity." Thus, the United States admits the deed, and denies only the motive.

In fact, the Secretary's administrative practice indicates

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in the record, since we had failed to authenticate it; when we subsequently provided such authentication, the court, following the decision in *Dallas County v. Commercial Union Assurance Co.,* 286 F.2d 388 (5th Cir. 1961), admitted the account into evidence, by order dated April 1, 1977. App. I, 9.

17. According to the United States, the only reported case where the Secretary did not comply with state filing procedures was *Turner v. Kings River Cons. Dist.,* 360 F.2d 184 (9th Cir. 1966). U.S. Br. 56. However, as noted above, California law did not require the Secretary to comply with state filing procedures in that case. See note 2, *supra.*

that, at least until recently,[18] he took the historic position that section 8 *required* him to *fully* comply with state law. Pet. Br. 36-40. For instance, his present regulations, issued in 1959, provide that "project plans must comply with State

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18. In arguing that its position is supported by the Secretary's administrative practice, the United States cites only a statement from a treatise which declares that the "comity" argument reflects the "*present* position" of the United States. U.S. Br. 138. (Emphasis added.) Since the treatise was written in 1967, it shows only that the "comity" argument is of recent vintage.

Further, the statement in the treatise is not even consistent with a recent statement of the Commissioner of Reclamation to a congressional committee, to the effect that, "going back to the basic Reclamation Act of 1902, we are required to obtain water rights pursuant to State law, and we do." "Missouri River Basin Industrial Water Marketing," Hearing before the Subcommittee on Energy Research and Water Resources of the Senate Committee on Interior and Insular Affairs, 94th Cong., 1st Sess., Pt. 1, at 54 (1975). Responding to a question from Senator Abourezk, the Commissioner's representative advised the committee that the United States brought the present action to determine whether the conditions of Decision 1422 are "consistent with the authorization that was made by Congress," *id.* at 56, 57, which is, of course, the test that we urge to be applicable under § 8. The Commissioner's representative further stated:

> "If a future State Governor would attempt to use waters which the Congress had allocated for irrigation to another use, the Bureau and the Department are placed in a situation in which we don't know which way to go. . . . This is the reason that we asked for clarification from the courts." *Id.* at 57.

Thus, the Commissioner's representative told the committee that the issue in this case is whether a state can impose conditions contrary to project purposes, which is not the issue in the case. By telling the committee that the Secretary is "required to obtain water rights under state law," he failed to reveal that the United States takes the opposite position in this case. The United States thus seeks powers from this Court which it has failed to obtain from Congress, and has failed to inform Congress of its intention to do so.

Finally, the United States notes that the Commissioner stated in 1975 that, although "each state has the duty to determine under its own statutes how its unappropriated water is to be used," the states cannot "dictate daily operations" of projects or "dictate future changes in authorized uses." U.S. Br. 139; Pet. Br. 39-40. This statement suggests that the states can impose conditions under *some* circumstances, and thus is not consistent with either the United States' "comity" or "form" arguments.

legal provisions or priorities for beneficial use of water," that the Bureau must comply with "the interests and rights of the States in the utilization and control of their water resources," and thus that "it is necessary to reach an understanding with the States regarding reservoir operating limitations." Pet. Br. 39; App. No. 2, pp. 9a-11a (attached hereto). Contemporaneously with the passage of section 8, he noted that "in some of the States radical changes in the laws must be made before important projects can be undertaken." Pet. Br. 37. Shortly after the section's passage, the U. S. Attorney General rendered a formal opinion, stating that the Secretary is without authority to reserve unappropriated water without complying with state laws relating to the "beneficial use" of water; he stated that section 8 followed the tradition of state control that had been recognized by Congress in the acts of 1866, 1870 and 1877.[19] Thus, con-

19. According to the opinion:

"The practical question thus presented is, whether the United States, by the exercise of executive authority, has the right to control the use of unappropriated waters passing through the public lands in a State, so as to prevent their appropriation by others for any of the beneficial uses recognized and allowed by the statutes of the State.

• • •

"In all the arid land States the common law rule as to the right of a riparian proprietor to the continued flow of a stream over his land has been changed, and rights to the use of water for manufacturing, mining, agricultural and other beneficial purposes have accrued and vested, under local customs, the laws of the States and the decisions of the courts. . . . The laws of the State provide that the use of such water may be acquired by appropriation, and as between appropriations the first in time shall be first in right.

• • •

"These acts [the acts of 1866, 1870 and 1877] evince a clear and definite purpose to authorize and assent to the appropriation of water upon the public lands in contravention of the common law —as to continuous flow."

• • •

"Section 8 of the reclamation act is an emphatic declaration that such laws [the acts of 1866, 1870 and 1877] are to continue in force.

temporaneously with the passage of section 8, federal officials construed the section as providing for state regulatory control of water. As the United States notes in its brief in another case pending before this Court, in which the United States argues for a continuation of the tradition of state control of water in interpreting the federal mining laws:

> "[E]ven if the statutory scheme were not clear on its face, the 'great deference' due to the statutory interpretations adopted by the officers charged with administering the lands laws [citations omitted] should preclude judicial interpretation of the statute at this late date to find water to be a locatable mineral. This deference is especially appropriate where the administrative practice at stake '"involves a contemporaneous construction of a statute by the men charged with responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new."' [Citations omitted.]" Brief for the Petitioner, 30-31, *Andrus v. Charlestone Stone Products, Inc.*, No. 77-380.[20]

. . . A withdrawal of waters from appropriation under the State and Territorial laws would be in direct conflict with the provisions of said section.

"I have therefore to advise that there is no authority to make an executive withdrawal of public lands in a State as will reserve the waters of a stream flowing over the same from appropriation under the laws of the State, or will in any manner interfere with its laws relating to the control, appropriation, use, or distribution of water." 32 I.D. 254, 255, 256, 258 (1903). (Emphasis added.)

20. The United States also notes that the Reclamation Service stated in 1904 that, although the Secretary must fully comply with state law under § 8, he need do so only "so far as it is possible under the operations of the reclamation act," and may not be required to do so if "the state laws may be such that it is impossible to comply with them in conducting operations under the reclamation act." U.S. Br. 141 n. 107. These statements, of course, support our view that the Secretary is not bound by state laws which impair project purposes, and fail to support the United States' "comity" and "form" arguments.

III. CONGRESS HAS ESTABLISHED SPECIFIC, SUBSTANTIVE RECLAMATION POLICIES THAT LIMIT THE PRINCIPLE OF STATE CONTROL, BUT THE PRINCIPLE OF STATE CONTROL REMAINS VALID TO THE EXTENT NOT IN CONFLICT WITH SUCH SPECIFIC POLICIES.

The United States argues that provisions of the Reclamation Act of 1902, and of supplementary legislation later enacted by Congress, provide federal officials with broad, discretionary authority to carry out the policies of Congress' reclamation laws, and that this authority "leaves no room" for state control. U.S. Br. 86. The United States' argument is essentially that, if section 8 might otherwise be construed to provide for broad state control of water, the section is inferentially overridden by other provisions of the Reclamation Act of 1902, or has been inferentially repealed by Congress in subsequent acts. As we shall see, the substantive reclamation policies enacted by Congress in its supplementary laws limit the principle of state control in section 8, but nonetheless leave ample room for the applicability of a wide range of state laws that are not in conflict with these substantive reclamation policies.

A. Sections 2, 6, 7 and 10 of the Reclamation Act of 1902.

The United States argues that various provisions of the Reclamation Act of 1902, specifically sections 2, 6, 7 and 10, provide the Secretary with broad operational authority to carry out the provisions of the act, and thus free him from his obligation to comply with state law under section 8. U.S. Br. 91.[21] However, these statutory provisions have no

21. Section 2 authorizes the Secretary to make examinations and surveys for reclamation projects. 32 Stat. 388 (1902). Section 6 authorizes him to manage and operate the projects. *Id.* at 389. Section 7 authorizes him to acquire private water rights by purchase or condemnation. *Id.* at 389-390. Section 10 authorizes him to adopt rules and regulations to carry out the act's provisions. *Id.* at 390.

relevance to unappropriated water, or to how the Secretary acquires his rights to such water. Thus, the sections do not conflict with the directive in section 8 that provides for state control of unappropriated water. The United States essentially argues that other provisions of the 1902 act override section 8, and render it meaningless. Its argument is inconsistent with the rule of statutory construction that "a statute should be construed so that effect is given to all its provisions, and so that no part will be inoperative or superfluous, void or insignificant, and so that one section will not destroy another unless the provision is the result of obvious mistake or error." 2A Sutherland, *Statutory Construction* 63 (4th ed. 1973). See *Weinberger v. Hynson, Westcott & Dunning*, 412 U.S. 609, 633 (1973).

B. Supplementary Reclamation Laws.

Relying on the analysis of Professor Sax, the United States argues that supplementary reclamation laws and policies, enacted in 1911, 1914, 1920 and 1939, vest the Secretary with broad discretion to carry out the purposes of Congress' reclamation laws; accordingly, the United States argues, Congress has "occupied the field" with respect to water allocation and use, and has left no room for state control. U.S. Br. 89. There can be no question that these supplementary laws establish a broad network of specific, substantive congressional policies that cannot be contravened by the states, and thus that diminish the authority of the states under section 8. Pet. Br. 58-60. However, none of these supplementary laws expressly repeals the principle of state control in section 8, nor does the United States argue otherwise. Thus, it is clear that, if a state law does not conflict with a specific congressional policy set forth in the supplementary laws, the state law is applicable to the Secretary under section 8.

The United States does not argue that state law in this case conflicts with a specific congressional policy set forth in the supplementary laws. Rather, it argues that the supplementary laws, in totality, vest federal officials with absolute, exclusive discretion over the use of water, thus enabling them to override state water laws whenever they choose to do so. The Court should be under no illusion as to the effect of this argument. Under this argument, section 8 would have no practical meaning or effect whatsoever. A major, fundamental policy of federal reclamation law, the provision of state control in section 8, would have repealed by implication. However, this Court does not favor repeals by implication. *Morton v. Mancari*, 417 U.S. 535, 549-551 (1974); *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976). As noted in *Radzanower:*

> "'Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment. [Citation omitted.] The reason and philosophy of the rule is, that when the mind of the legislator has been turned to the details of the subject, and he has acted upon it, a subsequent statute in general terms, or treating the subject in a general manner, and not expressly contradicting the earlier act, shall not be considered as intended to affect the more particular or positive previous provisions, unless it is absolutely necessary to give the latter act such a construction, in order that its words shall have any meaning at all.'" 426 U.S. at 153.[22]

22. The United States also notes that § 102(b) of the Federal Water Pollution Control Act, 86 Stat. 816, 33 U.S.C. (Supp. V) §§ 1251 *et seq.*, as amended Pub.L. 95-217, 91 Stat. 1567 (1977), provides that federal agencies must "consider" the inclusion of storage for the purpose of regulating streamflow, and argues that this provision does not enable the states to regulate such streamflow. U.S. Br. 99-100. However, § 313 of the act, as amended in 1977 to overcome this Court's decision in *EPA v. California*, 426 U.S. 200 (1976), expressly requires federal agencies to fully comply with state permit procedures relating to water quality matters. Thus, § 102(b) requires federal agencies to "consider" water quality matters, and § 313 subjects their considerations to state control. Section 313 is thus another example of a federal law, such as § 8, which subjects a federal agency's discretionary review to state law.

Closer analysis of the supplementary laws reveals that Congress, far from inferentially repealing the principle of state control in section 8, consistently reaffirmed that principle. The Warren Act of 1911, 36 Stat. 925, 43 U.S.C. §§ 523 *et seq.*, provides for the sale of surplus water, when a project impounds more water than is needed for irrigation purposes. Congress inserted a provision in the act providing that "nothing contained in this Act shall be held or construed as enlarging or attempting to enlarge the right of the United States, under existing law, to control the waters of any stream in any State." 36 Stat. 926, 43 U.S.C. § 524. This provision was inserted, it was explained, "to allay and set aside any suspicion that anyone might entertain that the Government has the right to the water." 46 Cong. Rec. 2783, 61st Cong., 3d Sess. (1911) (Rep. Reeder). The Senate and House reports, in explaining the provision, quoted from a report submitted by the Secretary of the Interior, as follows:

> "'Section 8 of the reclamation act provides, among other things, in effect that the use and distribution of water appropriated and impounded by the Secretary of the Interior under said act shall conform with the state laws, and Congress could not otherwise provide, for the reason, as stated by Mr. Justice Brewer, in Kansas v. Colorado (206 U.S. 46, 92), "We do not mean that its legislation can override state laws in respect to the general subject of reclamation."'" S. Rep. No. 442, 61st Cong., 3d Sess. 3 (1910); H.R. Rep. No. 2002, 61st Cong., 3d Sess. 3 (1911).

The Reclamation Extension Act of 1914, 38 Stat. 686, enlarges the time within which construction charges can be repaid to the reclamation fund by users of project water. In the congressional debates, it was explained that this act would not impair the provision of state control in section 8:

> "[U]nder the reclamation law the Secretary of the Interior applies for a water right for these lands under the State law just as a private appropriator does, in accordance with the State statute. These people do not differ in their rights at all from their neighbors, who also use water. The only difference is that they are dealing with the Secretary of the Interior, where the others are dealing with private parties or cooperative associations." 51 Cong. Rec. 12954, 63d Cong., 2d Sess. (1914) (Rep. Mondell).

The Act of February 25, 1920, 41 Stat. 451, 43 U.S.C. § 521, expanded the coverage of the Reclamation Act of 1902 to include non-irrigation purposes. This act also expanded the coverage of section 8 to include such non-irrigation purposes. See note 9, *supra*. According to the act's legislative history:

> "[The Secretary] has no authority except as we give him authority as an agent to do what any other agent could do *under the State law;* and we provide here that, acting as the agent or the trustee of these people, he may, of the water diverted *under the State law,* provide for its use for certain purposes incidental to irrigation." 59 Cong. Rec. 2981, 66th Cong., 2d Sess. (1920) (Rep. Mondell). (Emphasis added.)

Finally, the Reclamation Project Act of 1939, 53 Stat. 1187, provided for payment of construction charges on federal reclamation projects. The act was amended in 1956 to include a provision identical to section 8. 70 Stat. 484, 43 U.S.C. § 485h-4. The amendment was necessary, it was

explained, "to avoid any possibility that this bill might be construed to depart from the basic policy of section 8 of the Reclamation Act of 1902 . . . ." S. Rep. No. 2241, 84th Cong., 2d Sess. 5 (1956); H.R. Rep. No. 1754, 84th Cong., 2d Sess. 5 (1956).

Thus, these acts reveal that, rather than abandoning the fundamental policy of section 8, Congress has consistently reaffirmed that policy.[23]

The United States, although relying on Professor Sax's analysis of the supplementary laws, fails to mention Sax's conclusion that, where the supplementary laws do not conflict with state law, the state law is valid. Indeed, Sax's thesis is not that the supplementary laws have destroyed the concept of state control in section 8; rather, it is that the supplementary laws reject the notion that the states have a veto power over the projects, and thus can override what Congress has done. According to Sax:

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23. Similarly, Congress reaffirmed that policy in enacting the McCarran Amendment, 43 U.S.C. § 666(a), which subjects the United States' water rights to adjudication by state courts. The Senate report, after tracing the development of the appropriation doctrine in the western states, concluded:

> ". . . Congress was most careful not to upset, in any way, the irrigation and water laws of the Western States. In 1902 Congress wrote into the Federal Reclamation Act a strict admonition to the Secretary of the Interior . . . [in] Section 8. . . .
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> "In the arid Western States, for more than 80 years, the law has been that the water above and beneath the surface of the ground belongs to the public, and the right to the use thereof is to be acquired from the State in which it is found, which State is vested with the primary control thereof. . . .
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> • • •
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> "Since it is clear that the States have the control of water within their boundaries, it is essential that each and every owner along a given water course, including the United States, must be amenable to the law of the State, if there is to be a proper administration of water law as it has developed over the years." S. Rep. No. 755, 82d Cong., 1st Sess. 3, 6 (1951).

"Certainly the first step must be to stop thinking that effectuation of congressional intent requires us to read section 8 literally; we must, for a variety of reasons, begin to view the purpose of section 8 in a somewhat more sophisticated manner. First, as we have already seen, even in 1902 it was clear that Congress did not mean section 8 to be read literally, but rather intended it to be read as *requiring federal deference to state law only insofar as state law was not inconsistent with federal policies.* Thus, now as then, section 8 must be read not as permitting a state veto power, but merely as an invitation to the states to act where Congress has done nothing.

"Of course the easy problems have already been solved, and properly, by the Court. Where there is a "specific and mandatory" federal rule in the law, it must be observed even when in derogation of state law. But all the really difficult problems lie ahead, for as we have now seen, the reclamation laws are full of federal policies of varying specificity, of varying importance and of varying clarity. . . .

"These and like questions present the ultimate difficulty for problems of federalism because there is no readily ascertainable solution for them. To find an answer we must look to the rather indefinite "policy" of the law for guidance. But to the policy of state law, or of federal law? That is the question, for we will frequently get different results if we look at one source rather than the other.

"The dilemma is presented by traditional congressional unwillingness to face up to the problem. It has never openly repudiated state law as the principal source for administration of reclamation projects, yet, as we have seen, it has made clear its desire to utilize the reclamation laws to implement all sorts of diverse federal policies.

"But while Congress has been unwilling to meet the problem directly, it has made the answer apparent

enough through its actions. It is as simple as asking whether we can permit the congressional desire to administer projects such as Fry.-Ark. in conformity with federal farm policy to be ignored? Or whether the congressional interest in recreation could be vitiated by a state legislature subject to pressures from mining or farm lobbies? Or whether the Secretary, entrusted by Congress to decide whether an application for surplus water will interfere with irrigation, must have state officials decide that question for him?

"Certainly Congress has made plain enough that it wants these national policies implemented. . . . The Secretary must look to *federal* law—to the statutes, to the legislative history and to the total fabric of national concerns and interests in administering federal reclamation projects. . . .

"This, of course, does not mean that state law will have no place; where it is not incompatible with the federal policy state law may be resorted to. . . .

"Nor, finally, ought this view to be rejected as novel and unprecedented. By now some readers will have recognized that the theory proposed here is little more than an application to federal reclamation law of the principle announced by the Supreme Court to govern the law of collective bargaining contracts. Indeed, the language used by the Court in the *Lincoln Mills* case is so appropriate to this situation that it may be paraphrased here as perfectly stating the proposed rule for reclamation projects:

> We conclude that the substantive law to apply in [administering federal projects] is federal law, which the [Secretary] must fashion from the policy of our national [reclamation] laws. . . . The [Reclamation Act] expressly furnishes some substantive law. It points out what . . . may or may not [be done] in certain situations. Other problems will lie in the penumbra of express statutory mandates. Some will lack express statutory sanction but will

be solved by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy. The range of [the Secretary's] inventiveness will be determined by the nature of the problem. . . . Federal interpretation of the federal law will govern, not state law. . . . *But state law, if compatible with the purpose of* [*the Act*], [*should*] *be resorted to in order to find the rule that will best effectuate the federal policy.*" Sax, "Problems of Federalism in Reclamation Law," 37 *Univ. of Colo. L. Rev.* 49, 79, 81-84 (1964). (Emphasis added; footnotes omitted.)

C. Pre-Authorization Planning Procedures.

The United States points out that the federal reclamation laws provide planning procedures that must be followed by federal officials prior to congressional authorization of the project. U.S. Br. 104. It notes that these procedures authorize the states to participate in the formulation of a federal project, and thus provide the state with a voice in the authorization process. *Ibid.* It argues that these procedures would be "pointless" if a state were authorized to subsequently impose conditions on the federal water right, after the project has been authorized. *Ibid.*

There is no question that the states have an opportunity to help shape the contours of a federal project during the authorization process, and that, once the project receives its final shape from Congress, the state cannot re-shape the project. Thus, the issue in this case is not whether the states can change a regulatory scheme established by Congress, such as by negating the congressionally-mandated purposes of the project or rendering the project economically infeasible; both sides agree that the states lack such authority. Rather, the issue is whether the states have authority to develop a scheme for the acquisition and use of water that complements, and does not conflict with, the congressional scheme. It is whether the states have any authority to fill in the details of the congressional scheme, to the extent that such details were not specifically determined in the authorization process.

The United States, in arguing that our view would render the planning procedures "pointless," assumes that the authorizing act provides a definitive reclamation scheme that leaves no room for administrative adjustment by the states. Its assumption does not accord with reality. In authorizing a project, Congress typically sets forth only a general reclamation scheme; it typically describes the basic purposes of the project, the amount of water to be impounded, and so forth. But the passage of the authorizing act gives rise to a host of problems and concerns involving water allocations, many of which may not have been considered or foreseen in the authorizing act. These problems and concerns are typically local, not national, in nature. For example, is the public interest better served by providing for economic development of one agricultural area rather than another, or for development of one municipality rather than another? How can the acquisition and use of project water be fully coordinated with the acquisition and use of water by non-federal projects?[24]

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24. For instance, in Decision 1379, the State Board has imposed conditions in permits issued to the Bureau and the California Department of Water Resources, the operator of California's State Water Project; the conditions provide for the coordinated release of water from both federal and state projects in California, in sufficient amounts to prevent salinity intrusion in the Sacramento-San Joaquin Delta. The Delta is a complex, delicate eco-system that functions as a "pool" where most waters from federal and state projects in California are received, and from which waters are exported by pumping facilities to customers of both federal and state projects. Decision 1379 was the product of hearings that lasted for several years, and in which the Bureau was an active

What kind of conservation measures, if any, should be imposed on farmers receiving project water, to insure the most beneficial use of water? See Amicus Curiae Brief of Charles J. Meyers, 13-14.

Indeed, this case presents an example of how a state has responded to problems, primarily local in nature, that were not foreseen in the authorizing act. Congress authorized the New Melones Project to provide water for the East Side Division, a proposed addition to the Central Valley Project. Pet. Br. 8. The project was not authorized in isolation; rather, it was authorized "as a part of the plan of development for the proposed East Side Division." H.R. Doc. No. 453, 87th Cong., 2d Sess. 83 (1962). The benefit-cost analysis, as well as the analysis of irrigation and power benefits, was based on the assumption that water would be used in the East Side Division. *Ibid.* However, Congress has apparently abandoned its plans to proceed with construction of the East Side Division, and the congressional plan for water use cannot be fulfilled. Thus, the Bureau is proceeding with a different "project" from that considered and authorized by Congress. Moreover, the Bureau has failed, to this point, to develop an

participant. See generally Note. "The Delta Water Rights Decision," 2 *Ecology L. Quar.* 733 (1973).

Amicus Friant Water Users Ass'n, *et. al.* (hereinafter "Amicus Friant"), argues that the conditions of Decision 1379 are inconsistent with the purposes of federal projects in California. Amicus Friant Br. 26-30. It notes that it has brought a mandamus action, under California law, to review the validity of the conditions. *Ibid.* California's position in that action is that the conditions are harmonious with the purposes of the federal projects, and are protective of the beneficial use of water. The effect of the conditions upon project purposes can only be examined in the mandamus action, not here. Suffice it to say that, if the lower decision is sustained, California will have no opportunity in the mandamus action to present its view that the conditions are consistent with project purposes.

alternative plan for water use for its "project."[25] Congress failed to foresee, or provide for, these unusual circumstances in its authorizing act. The State Board, applying traditional principles of western water law, found that the Bureau had failed to develop a plan, and thus had failed to meet the "beneficial use" test; it deferred the Bureau's rights until the Bureau develops a plan and meets the test. Thus, the State Board's decision complements, and does not conflict with, the congressional scheme found in the authorizing act. Far from rendering the planning procedures "pointless," the decision bridges a gap that the planning procedures overlooked.

Since Congress cannot usually foresee the broad range of problems that may arise from its authorizing acts, it usually does not provide an answer to all these problems. To the extent that a congressional answer is not provided, it is difficult to perceive any national interest that prevents a state from entering the arena, assuming that its entry does not have the effect of negating the project purposes. Since these problems are usually local in nature, they usually

25. Amicus Friant argues that California's permit system enables California to obtain "full knowledge" of the Bureau's proposed water uses. Amicus Friant Br. 23-26. However, Amicus Friant fails to explain how California can obtain this information if, as argued by the United States, the Bureau need not comply with California's permit system. Moreover, the Bureau, in its permit applications in this case, provided only a general project description containing the same information already found in the authorizing act, and did not provide a concrete plan for water use; its applications merely state that water will be used for "irrigation" and other purposes, but do not specify where, or in what specific amounts, such water will be used. App. II, 63. More importantly, the broader issue in this case is whether the state has the right to determine the most beneficial use of water, not whether the Bureau must merely submit a plan to the state. The state's right to obtain information relating to the Bureau's proposed water uses does not afford the state an opportunity to determine the most beneficial use of water, as contemplated by § 8.

have little effect on any discernible national interest. Conversely, they have a vital impact on state interests. In the water-scarce western states, the use of project water by one group of farmers rather than another, or by one municipality rather than another, usually establishes the pattern of economic growth and development of each state. Thus, the states have an interest in insuring that project water, similarly to other waters, are put to their most beneficial use, as determined by the state. This is the primary reason why Congress, in enacting section 8, entrusted this function to the states. If the result were otherwise, California and other western states would lack authority to solve a wide range of water allocation problems, no matter how much the problems may affect local rather than national interests.[26]

26. The United States points out that the National Environmental Policy Act of 1969 (NEPA), 83 Stat. 852, 42 U.S.C. §§ 4321 *et seq.*, requires the preparation of an environmental impact statement (EIS) with respect to certain actions of federal agencies; it argues that NEPA enables Congress and the Secretary to learn, prior to congressional authorization of a project, of potentially adverse environmental effects of the project. U.S. Br. 100. However, NEPA's sister act, the National Environmental Quality Act of 1970, 84 Stat. 114, 42 U.S.C. §§ 4371 *et seq.*, provides that "there is a national policy for the environment which provides for the enhancement of environmental quality," and that "the primary responsibility for implementing this policy rests with State and local governments." *Id.*, at § 4371(b). Further, NEPA merely provides a method for analysis of a proposed action, and thus serves as one form of information which Congress and the Secretary may consider in determining, prior to project authorization, whether to proceed with construction of the project; it does not necessarily provide them with information sufficient to either anticipate or to determine the wide range of water allocation problems, many of which are local in nature, which might arise after the project is authorized. For instance, the EIS prepared for the New Melones Project fails to consider the effect of Congress' apparent abandonment of the East Side Division, and the Secretary's unilateral decision to utilize the yield of New Melones in other locations. See Environmental Impact Statement, New Melones Lake, Stanislaus River, California (U.S. Army Engineer District, Sacramento, Cal., May 1972). Some of the possible consequences of the Secretary's decision were analyzed in a supplemental EIS, but even that document declared that "[u]ntil the decision of the State Water Resources Control Board is rendered, and water service contracts have been executed, the environmental impact of the use of the new conservation yield and related aspects of the project cannot be specifically evaluated." Supplemental EIS, New Melones Lake, Stanislaus River, California, B-3 (Bureau of Reclamation, 1973).

D. Unitary Federal Control v. Tradition of State Control.

The United States argues that our view is "unworkable," because the efficient operation of a federal reclamation project depends on unitary federal control. U.S. Br. 112. In fact, our view is that which has been followed in actual, historical practice. The Secretary has *always* complied with state regulatory water law under the Reclamation Act of 1902. Pet. Br. 36-40; see page 32, *supra*. In California, for example, he has acquired appropriative permits from the State since 1927, and has consistently complied with conditions in the permits. *Ibid.;* App. II, 2. Thus, the Secretary has historically complied *fully* with state law, not just with the "forms" of state law. He now seeks to change that historical practice, arguing that the historical practice is "unworkable." To argue, at this late date, that the historical practice is "unworkable" is to suggest that the entire federal reclamation program has been, since its inception, an historical failure. It is to defy Justice Holmes' admonition that "a page of history is worth a volume of logic." *New York Trust Co. v. Eisner,* 256 U.S. 345, 349 (1921).

Indeed, we question the workability of the view urged by the United States. Under that view, the Secretary would have exclusive, discretionary authority to control water uses, and thus to override state water laws whenever he chooses to do so. Thus, he would be setting social policy in the western states, determining which economic and

municipal groups receive water and which do not. Moreover, since the Secretary has not traditionally controlled water rights, he has failed to develop a mechanism, in the form of structured administrative proceedings that are subject to judicial review, that enable him to discover the many factors that are relevant to the public interest. Thus, he would be setting social policy in a regulatory vacuum, largely free of controls other than those imposed directly by Congress; indeed, the concept of discretion presumes a measure of freedom from regulatory control. This result invites the possibility, as suggested by Justice Douglas, that a farmer "can receive his priority because he is the most worthy Democrat or Republican as the case may be." *Arizona v. California,* 373 U.S. 546, 630 (1963) (Douglas, J., dissenting). Conversely, the western states, which have traditionally controlled water rights, have developed elaborate administrative machinery that enables them to examine all factors relevant to the public interest, and have provided for judicial review of the administrative process. Hence, the western states, unlike the Secretary, have developed a mechanism that is uniquely designed to provide for the most beneficial use of water. A system that requires the Bureau to participate in administrative proceedings intended to discover the most beneficial use of water, and that are subject to judicial review, is eminently more sound and workable than one that effectively allows the Secretary to operate in a regulatory vacuum.

The United States' argument, that the federal projects can be efficiently operated under only unified federal control, was the same argument that was considered, and rejected, by Congress in 1902. Congress evidently believed that the interest of unified control was outweighed by the interest of continuing and extending the tradition of state

control of water, a tradition recognized and approved by Congress in the acts of 1866, 1870 and 1877. Pet. Br. 32-33. Indeed, it would be anomalous to exempt the distribution of water under the 1902 act from state water laws, since such water is distributed to the same local economic interests that, under the acts of 1866, 1870 and 1877, are otherwise subject to such state laws. Thus, Congress weighed competing, disparate interests in enacting section 8; it reached a result that it believed accommodated both national and local interests within the delicate framework of our federal system. The United States seeks to have this Court reweigh these interests, and overturn the accommodation carefully worked out by Congress.

IV. ASSUMING ARGUENDO THAT THE UNITED STATES IS NOT BARRED FROM COLLATERALLY ATTACKING THE VALIDITY OF THE CONDITIONS OF DECISION 1422, THE CONDITIONS ARE FULLY CONSISTENT WITH THE SPECIFIC PURPOSES OF THE NEW MELONES PROJECT.

The United States argues that the conditions of Decision 1422 "exemplify the unworkability" of our view. U.S. Br. 57. As noted later, the United States is precluded from collaterally attacking the validity of the conditions, if the State Board had general jurisdiction to impose conditions. See page 61, *infra*. However, the United States argues that the conditions themselves demonstrate the "unworkability" of our view, and thus show that the State Board lacked such general jurisdiction.

If the United States' argument is upheld, it will have succeeded in nullifying the states' authority to impose *any* conditions under section 8, on grounds that the conditions in this case are, under its argument, unduly broad. Under that result, California and other western states would have

no opportunity to show that state-imposed conditions in other, or future, cases are fully harmonious with the purposes of the federal projects in question.[27] Even if the United States is correct in arguing that the conditions of Decision 1422 are unduly broad, that fact does not justify the United States' conclusion that the states are without authority to impose conditions under *any* circumstances.

Moreover, closer scrutiny of the conditions of Decision 1422 reveals that, if the doctrines of res judicata and collateral estoppel do not foreclose consideration of the question, the conditions are not inconsistent with the purposes of the New Melones Project, and are not unworkable. The basic objective of the project, as noted above, is to serve eight specified purposes,[28] and to be operated in a way that

27. Thus, the United States would have succeeded in its strategy to focus this Court's attention solely on Decision 1422 in resolving the meaning of § 8, rather than on two other decisions—Decisions 1379 and 1400—where the State Board has imposed different conditions on water uses of different reclamation projects. In fact, Decision 1379 is a landmark administrative decision that has much greater statewide significance than Decision 1422, and was issued prior to Decision 1422; thus, Decision 1379 logically would have merited judicial attention before Decision 1422. Prior to the filing of this action, California brought an action against the United States to resolve the validity of the conditions of Decision 1379, as well as the conditions of Decision 1400 and 1422. See *State of California v. Morton*, No. S-2924 (E.D. Cal.). However, the district court granted the United States' motion to stay further proceedings on the State-filed action, so that the present action could go forth. Thus, the United States has successfully focused this Court's attention solely on the conditions of Decision 1422, and now argues that the "unworkability" of the conditions stigmatizes *all* state-imposed conditions, apparently including those contained in Decisions 1379 and 1400. Our view, as we argued in opposing the United States' motion to stay further proceedings on the State-filed action, is that the validity of conditions in other cases must be examined on the basis of the facts in those cases, not here.

28. The purposes are flood control, agricultural use, municipal use, industrial use, fish and wildlife protection, water quality control, power and recreation. Pet. Br. 3-4.

is economically feasible; further, its objective is to provide agricultural and power benefits, as well as other consumptive use benefits, to the East Side Division. Pet. Br. 8 n. 11; see page 46, *supra*. The United States does not argue that the conditions of Decision 1422 prevent the flow of such benefits to the East Side Division; it cannot make that argument, since Congress has apparently abandoned plans to build the East Side Division. The United States does not argue that the conditions prevent the Secretary from using water for specific consumptive purposes in a specific area or areas; it cannot make that argument, since the Secretary has failed to develop a plan to use such water. Instead, it argues that the conditions, in deferring full impoundment, may make the project economically infeasible. U.S. Br. 64-65. However, the State Board's decision to defer full impoundment is based on the Secretary's failure to develop a plan for water use; thus, it is the Secretary's failure to develop a plan, not the conditions which defer full impoundment until he develops a plan, that threatens to defer realization of the full benefits of the project, and thus defer the economic feasibility of the project. The United States seeks to make the State Board the scapegoat for the Secretary's failure to act, and then argues that, since the State Board is the scapegoat, the states have no business in the field of reclamation. The United States was more accurate when the Army Corps of Engineers advised the Council of Environmental Quality that "the board, in its decision, has manifested its awareness of the dynamic nature of these [project] needs." Pet. Br. 10 n. 12. The United States was more candid when it advised this Court in another case that the decision does not "fundamentally alter" the value of the project, *id.* at 10, a concession which it recants now that

the concession proves embarrassing to its position in this case. U.S. Br. 67 n. 43.[29]

Further, the United States argues that, since the conditions allow the State Board to "weigh" the "benefits" and "damage" of the Secretary's future water plan, the conditions *may* enable the State Board, in the *future*, to determine "whether the purpose for which Congress had authorized" the project "would be allowed to go forward." U.S. Br. 66. We concede, however, that the State Board cannot

29. The United States also argues that the State Board denied full power benefits for the project, even though it found that there was a "beneficial use" of water for power purposes. U.S. Br. 64. In fact, the State Board followed congressional policy relating to power purposes of federal reclamation projects. As was explained by the floor manager for the Conference Committee in 1939, in explaining the bill that became the Reclamation Project Act:

> "Power is subsidiary to reclamation. It is only available where the storage dam raises the water to a sufficient level." 84 Cong. Rec. 10220, 76th Cong., 1st Sess. (1939).

Thus, Congress does not intend for federal reclamation projects to store water *solely* for power purposes. Rather, it intends that water can be used for power, to the extent that it is stored for *other* purposes. This same scheme was followed in the act authorizing the New Melones Project. H.R. Doc. No. 453, 87th Cong., 2d Sess. 50, 51, 52 (1962). The State Board followed this congressional scheme, by allowing water to be used for power to the extent that it is impounded for other (fish and wildlife protection, water quality control) purposes. App. II, 33-34. It deferred the use of water for additional power until the Secretary is allowed to store additional water for other consumptive (agricultural, municipal, industrial) purposes. *Ibid.* The United States' argument that water should be impounded *solely* for power purposes is inconsistent with congressional policy. Moreover, it would result in a different project from that authorized by Congress, one that would be much less economically feasible. H.R. Doc. No. 453, 87th Cong., 2d Sess. 52 (1962).

Further, although the Secretary plans to build a power plant with a capacity of 300,000 kw., App. I, 16, the authorizing act provides for a power plant with a capacity of only 150,000 kw. H.R. Doc. No. 453, 87th Cong., 2d Sess. 17 (1962). Hence, it cannot be argued that a temporary reduction of power benefits as planned by the Secretary, is inconsistent with the authorizing act.

take action, now or in the future, that will prevent the project purposes from going forward. The Court cannot determine in this case whether the State Board will exceed that limitation, since that question can only be determined when the State Board takes its future action. See *Public Service Comm'n v. Wycoff Co.*, 344 U.S. 237 (1952); *Eccles v. Peoples Bank*, 333 U.S. 426 (1948); cf. *Kaiser Steel Corp. v. W. S. Ranch Co.*, 391 U.S. 593 (1968).[30]

Having failed to show that the existing conditions impair the specific purposes or value of the project, the United States falls back on lesser arguments. First, it argues that the conditions interfere with its broad operational authority under the act. U.S. Br. 84. In fact, it argues, the conditions are so broad that they enable the State Board to "unilaterally redesign the operations of the project." U.S. Br. 85. However, we attach an appendix to this brief that describes the effect of each condition analyzed by the United States. App. No. 1, pp. 1a-8a (attached hereto). As this appendix shows, the United States has exaggerated the effect of the conditions. Except for the conditions limiting full impoundment, the conditions impose only minor obligations on the Secretary, and do not substantially alter the

30. The United States also argues that several other conditions, in reserving jurisdiction to the State Board to adopt future conditions on the basis of new information, enable the State Board to adopt conditions that may frustrate the purposes of the project. U.S. Br. 75-78. For instance, it argues that the State Board may adopt a future condition requiring all project water to be used for water quality control purposes. *Id.* at 77. We do not assert the right, of course, to adopt conditions, now or in the future, that negate project purposes, or render the project economically infeasible. Certainly a condition requiring all project water to be used for non-consumptive, water quality control purposes would render the project economically infeasible, and thus beyond the State Board's authority under § 8. However, the Court cannot determine in this case whether future conditions will exceed the State Board's authority under § 8, since that determination can only be made when, and if, such future conditions are adopted.

way that he plans to operate the project, much less alter any congressionally-authorized project purpose. As for the impoundment conditions, these conditions substantially alter the way that the Secretary plans to operate the project, in that the Secretary apparently intends to fully impound project waters before developing a plan for their use; however, as noted above, the conditions are eminently consistent with Congress' overall objectives for the project.

More importantly, the United States appears to suggest that, since the Secretary is authorized to "operate" the project, any condition that affects his operational authority is invalid. However, section 8 presupposes that state law will have an effect on the Secretary's operational authority, in the sense that he must distribute water consistently with state laws relating to the "beneficial use" of water; the language of section 8, in requiring the Secretary to "proceed in conformity with" such state laws, necessarily fixes an obligation on the Secretary that limits his operational authority. If the result were otherwise, the Secretary's operational authority would enable him to override state laws whenever he chooses, and thus nullify the fundamental reclamation policy contained in section 8. In fact, the Secretary's basic authority to "operate" the projects is found in section 6 of the Reclamation Act of 1902, 32 Stat. 389, and no member of Congress, in 1902, was disingenuous enough to suggest that this provision nullified the effect of section 8. Therefore, the proper inquiry is not whether the state law affects the way in which the Secretary "operates" the project, for section 8 inevitably has that effect. Rather, the proper inquiry is whether the state law is within the authority of the state under section 8, in that it is confined to protecting the "beneficial use" of

water and does not negate the basic purposes of the project or render it infeasible.

More generally, the United States argues that the authorizing act sets forth a congressional reclamation scheme of such "comprehensiveness and detail" as to leave no room for state control. U.S. Br. 86. This comprehensive scheme is found, it is argued, in the provisions requiring that the project be "initiated" as expeditiously as possible, requiring that the project be operated as an "integral part" of the Central Valley Project, requiring the Secretary to "give consideration" to the inclusion of water quality benefits, providing that the project shall be "operated" by the Secretary, and so forth. *Id.* at 82-86. As an example of how broadly the United States interprets the congressional scheme, it argues that there is no room for even the most nominal, minor conditions in Decision 1422, such as the conditions that require the Secretary to provide reports to the State Board so that the Board can determine whether the conditions are being met. *Id.* at 80. Importantly, the United States does not argue that the conditions of Decision 1422 prevent the Secretary from performing his duties under the act. It does not contend that the conditions require him to perform an act that is forbidden by the authorizing act, or prohibit him from performing an act that is mandated by the authorizing act. Rather, it argues that the congressional scheme fills every nook of the reclamation house, thus leaving no room for the states.

The United States' argument poses, perhaps, the ultimate question in this case, the answer to which will determine whether section 8 remains a viable principle of reclamation law. That is, does Congress, in authorizing a reclamation project, develop a comprehensive scheme that vests absolute discretion in the Secretary, thus leaving no

room for the applicability of state regulatory laws? Or, instead, is there room for the applicability of state regulatory laws in the congressional scheme, if the state laws do not contradict the *specific* purposes of the scheme? These questions are analogous to those which arise under the doctrine of preemption. Under that doctrine, the courts are called on to determine whether Congress, in passing a particular act, meant to "occupy the field" and thus void any state laws relating to the same subject matter, or instead meant to sanction state laws that do not interfere with a specific, identifiable provision or policy of federal law. See, *e.g., New York State Dept. of Social Services v. Dublino,* 413 U.S. 405 (1973); *Goldstein v. California,* 412 U.S. 546 (1973). Here, the United States' view is analogous to the former facet of the preemption doctrine, and California's view is analogous to the latter.

Section 8 indicates that Congress did not mean to "occupy the field" with respect to water uses of individual projects, but instead meant to defer to state law. The section embodies a major, fundamental principle of federal reclamation law, one that has been consistently followed in historical practice. Congress presumptively means for that principle to retain its vitality, until it says otherwise. Thus, the principle should be read into congressional acts that authorize individual projects, except where *specific* elements of the congressional scheme make it impossible to apply the principle. If the result were otherwise, the ample congressional assurances of 1902 relating to state control of water, would be withdrawn *sub silentio* every time that Congress authorizes an individual project. Section 8 would thus become a testament to an empty principle, one that endures on paper but is ignored in practice, "full of sound and fury, signifying nothing." The section

would have been repealed, for practical purposes, by congressional silence and implication. The United States, in the final analysis, asks this Court to abrogate one of the fundamental, historical principles of basic reclamation law. If that principle is to be abrogated, such must be done by Congress, not this Court.

Thus, we opt for the view, as expressed by Professor Sax, that "state law, if compatible with the purposes of [the Act], [should] be resorted to in order to find the rule that will best effectuate the federal policy." See page 43, *supra.* As Dean Meyers states, "[T]he Court should perform the admittedly harder but intellectually more honest task of determining whether the Congressional purposes in authorizing the construction and operation of the New Melones Project are frustrated to the extent that, in this case, the Section 8 presumption in favor of state law has been rebutted." Amicus Curiae Brief of Charles J. Meyers, 12. Thus, the Court, following the preemption analogy, should determine whether the conditions interfere with the specific purposes of the project.

The United States argues, however, that this task is too "complex" to be undertaken by the courts. U.S. Br. 85. This is the argument commonly raised by those who assert that the courts are powerless to fairly balance federal and state interests, even where congressional policy can only be fulfilled by such a balancing approach. It is an argument that this Court has rejected in other contexts; for instance, in *Textile Workers v. Lincoln Mills,* 353 U.S. 448, 456-457 (1957), the Court held that state policy, where not in conflict with *specific* federal policy, should be looked to in determining the rule that will best effectuate the federal policy relating to collective bargaining contracts.

Moreover, the inquiry which we suggest is not particularly difficult. As noted above, the United States has not

shown that the basic purposes and value of the project are frustrated by the conditions. See page 53, *supra*. Rather, it argues that the conditions conflict with the various provisions of the authorizing act that vest broad, discretionary authority in the Secretary. U.S. Br. 82-86. In fact, there is no such conflict. For example, there is no conflict between the congressional provision requiring that the project be "initiated" as expeditiously as possible, and the conditions that defer full impoundment until a water use plan is developed; if anything, the congressional provision requires the Secretary to expeditiously develop the plan which the State Board requires as the basis for full impoundment. There is no conflict between the congressional provision requiring that the Secretary "give consideration" to providing for water quality control, and the conditions that set proper levels for water quality control; the Secretary can fully comply with both obligations. There is no conflict between the congressional provision requiring that the project be operated as an "integral part" of the Central Valley Project, and the conditions that require a preference for water users in the Stanislaus River basin until the Secretary develops a plan for water use outside that basin; the Secretary can obtain the right to use water outside the basin as soon as he develops a plan for such use. There is no conflict between the congressional provision that provides that the project shall be "operated and maintained" by the Secretary, and the conditions that are designed to protect the "beneficial use" of water; as noted above, the Secretary can operate the project in conformity with the conditions.

Therefore, the Secretary's obligations under the authorizing act are fully compatible with his obligations under Decision 1422. He can fully comply with both sets of obligations. Thus, there is no conflict in this case between federal policy, as defined by Congress, and state policy. Rather, there is only a conflict between state policy and an administrative policy worked out by the federal executive branch, one that was not mandated or even considered by Congress. Section 8 clearly indicates that such conflicts must be resolved in favor of the state policy. If they are not, section 8 will have no practical effect. In that event, a fundamental principle of the federal reclamation laws will have been abrogated without a word from Congress.

V. THE DOCTRINE OF FINALITY OF JUDGMENTS BARS THE UNITED STATES FROM COLLATERALLY ATTACKING THE VALIDITY OF THE CONDITIONS OF DECISION 1422, IF THE STATE BOARD HAD GENERAL JURISDICTION TO IMPOSE CONDITIONS.

This Court need not examine the conditions of Decision 1422 to determine whether the conditions are consistent with the purposes of the New Melones Project. The doctrine of finality of judgments bars the United States from now challenging the validity of the conditions, and hence from arguing that the conditions are inconsistent with project purposes. The United States argues that this doctrine does not bar it from challenging the general jurisdiction of the State Board to impose conditions; it argues that, if the State Board lacks jurisdiction to impose conditions, the State Board cannot claim such jurisdiction because of the United States' failure to seek timely, direct judicial review of the conditions. U.S. Br. 144. We agree with this argument, but it is not responsive to our position.

Under California law, the doctrine of finality bars relitigation of a prior decision, if the decision was rendered by a court or agency of "competent jurisdiction." *Stockton v. Department of Employment*, 25 Cal.2d 264, 268 (1944);

De Celle v. City of Alameda, 221 Cal.App.2d 528, 538 (1963). The same rule applies in the federal courts. See *Commissioner v. Sunnen,* 333 U.S. 591, 597-598 (1949); *Southern Pac. R.R. Co. v. United States,* 168 U.S. 1, 48-49 (1897); *Tidewater Oil Co. v. Jackson,* 320 F.2d 157 (10th Cir.), *cert. denied* 375 U.S. 942 (1963); Restatement of the Law, *Judgments* § 7; Scott, "Collateral Estoppel by Judgment," 56 *Harv. L. Rev.* 1, 18-22 (1942); Note, "Collateral Estoppel Effect of Administrative Agency Actions in Federal Civil Litigation," 46 *George Wash. L. Rev.* 65, 72-73 (1977); 1B Moore, *Federal Practice* 631-653. Thus, the doctrine does not bar re-litigation of a prior decision, if the court or agency in the prior case lacked general jurisdiction to issue the decision; rather, it bars re-litigation only to the extent that the court or agency in the prior case had such general jurisdiction. *Ibid.* Applied here, the doctrine does not bar the United States from challenging the general jurisdiction of the State Board to impose conditions on the Bureau's appropriative permits.[31] Rather, it bars the United States from challenging the validity of the conditions, *if* it is held

31. Even if the doctrine were construed as barring the United States from asserting that the State Board lacks general jurisdiction to impose the conditions of Decision 1422, the petitioners have not objected to the United States' assertion of that question, and waive any objection they might have.

Further, the United States' complaint for declaratory relief asks for a judicial declaration on the broad jurisdictional question whether, and to what extent, the Bureau is required to comply with California's permit system. App. I, 19. The validity of the conditions of Decision 1422 is merely illustrative of the general jurisdictional question. *Ibid.* There are other cases currently pending in California that raise the same jurisdictional question as that presented here. See notes 24, 27, *supra.* Further, it is anticipated that another such case, of major statewide significance, may arise in the future. Therefore, the complaint states a proper request for a judicial declaration on the jurisdictional question, whether or not that question can be examined in the context of Decision 1422.

that the State Board has general jurisdiction to impose such conditions. If the State Board lacks such general jurisdiction, the conditions have no legal effect. However, if the State Board has such general jurisdiction, the conditions cannot be collaterally attacked. Hence, the United States is barred from attacking the conditions, to the extent that the State Board has jurisdiction to impose conditions. The lower court did not, as stated by the United States, reject our analysis. See U.S. Br. 142. Rather, it agreed with our analysis, but held that the State Board lacked general jurisdiction to impose conditions. App. I, 90-92.

The United States argues that the State Board did not find that the conditions are consistent with project purposes. U.S. Br. 143.[32] This argument misses the mark in

32. The United States also argues that the "beneficial use" test, as found in § 8, is different from the "beneficial use" test provided in California law, and thus that the State Board applied a different standard than that provided in federal law. U.S. Br. 143 n. 108. However, as noted above, the "beneficial use" proviso in § 8 was intended to incorporate the states' appropriation laws, and thus encourage the development of more "perfect and uniform" state laws. See page 25, *supra.* Hence, the "beneficial use" test is the same under both federal and state law.

The United States also argues that the State Board found that the Bureau's proposed uses were not in the "public interest," rather than inconsistent with "beneficial use." U.S. Br. 143 n. 108. However, the record indicates that the State Board found that the Bureau's uses failed to meet both the "beneficial use" test and the "public interest" test. The decision states:

> "[T]he Bureau has presented no specific plan for applying project water to *beneficial use* for consumptive purposes at any particular location. . . .
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> • • •
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> By failing to present evidence of a specific plan to use the water conserved by the New Melones Project for consumptive purposes, the Bureau has failed in spirit if not in substance to meet the statutory requirements for approval of a permit to appropriate water for such purposes. . . . [T]he law requires the Board to examine each application and determine that the water to be appropriated will be placed to *beneficial use.* . . .

two ways. First, it is irrelevant whether the State Board found that the conditions are consistent with project purposes. Under the doctrine of finality, a prior decision cannot be collaterally attacked regardless of the findings on which it is based; all that can be collaterally attacked is the general jurisdiction of the court or agency which rendered the prior decision. *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation,* 402 U.S. 313 (1971). Second, the State Board made findings indicating that the conditions are consistent with project purposes. It found that the Bureau had failed to meet the "beneficial use" test; since the authorizing act incorporates the proviso in section 8 that requires the Bureau to meet this test, Pet. Br. 65-66, the findings indicate that the Bureau has failed to meet the test which Congress, in authorizing the project, required as the basis for the federal water right.

> In addition, the specific intended use must be evaluated and found to be reasonable, *beneficial* and in the public interest before a permit can issue. . . .
>
> • • •
>
> "The public interest requires that the use of the Stanislaus River for whitewater boating, stream fishing and wildlife habitat be protected to the extent that water is not needed for other *beneficial uses.*" App. II, 19-20, 21, 31. (Emphasis added.)

Further, the "beneficial use" test and the "public interest" test are identical under federal law. Wyoming's permit system, the first to be adopted by the western states, provided that a permit could not be issued if the proposed use was "detrimental to the public interest;" its permit system was the model for permit systems adopted by other states. 2 Wiel 1551, 1557-1558; Pet. Br. 33-34. It is apparent that this is the kind of system that Congress had in mind in encouraging the states, by the passage of section 8, to develop more "perfect and uniform" water laws. See page 25, *supra.* Thus, Congress, in inserting the "beneficial use" proviso in section 8, meant for the states to broadly determine whether the proposed water use was in the public interest, and consistent with sound public policy.

The United States had an opportunity to directly challenge the validity of the conditions in a judicial proceeding under California law, an opportunity which it chose to ignore. If the United States were allowed to thus ignore its state judicial remedies, and instead collaterally attack the validity of the conditions in subsequent federal proceedings after the time has elapsed for pursuit of its state remedies, the validity of the conditions would always be in doubt. The United States would always be free to challenge the conditions, whenever it decided that it no longer wished to be bound by them. Under these circumstances, the policy underlying the doctrine of finality, which is to vest prior legal proceedings with certainty, would be subverted. Indeed, the Bureau would be able to present a skeletal case in the state administrative proceeding, ignore its state judicial remedies, and then—months or even years after the administrative decision is rendered—present the bulk of its case in a federal court. Section 8 was intended, in part, to avoid this result by requiring federal compliance with state judicial remedies, not just with state administrative proceedings.

VI. THE SECRETARY WAIVES HIS OBJECTION TO CONDITIONS IMPOSED UNDER STATE LAW, WHEN HE ELECTS TO ACQUIRE HIS WATER RIGHTS UNDER STATE LAW.

The United States argues that the lower court properly rejected our contention that, when the Secretary elects to acquire his water rights under state law, he waives his objections to conditions which the state attaches to his rights. U.S. Br. 147; Pet. Br. 68-70. In fact, the Ninth Circuit ruled that the Secretary does not acquire his water rights as a matter of "comity," but instead is *required* to acquire his water rights under the "forms" of state law.

Under that result, the Secretary does not have the right to elect to comply with state law, but is required to do so. If the Secretary lacks the power to make an election, he obviously waives nothing. Nor do we argue otherwise.

Rather, our argument is in response to the United States' "comity" argument, an argument that was rejected by the Ninth Circuit. If the Secretary complies with state law as a matter of "comity," he has the power to make an election as to whether he should so comply. If he elects to comply, he obtains valuable benefits; he obtains a recognition and quantification of his water rights without an expensive, protracted "general stream adjudication." Pet. Br. 43-45, 69. If the Secretary elects to acquire these valuable benefits under state law, he should be required, as a matter of equity, to comply with the limitations of state law. Equity does not authorize him to retain the benefits of a state-granted water right, free of the burdens which the state attaches to the right. To the extent that the Secretary complies with state law as a matter of "comity," equity compels that he take both the benefits and burdens of state law.

VII. THE SECRETARY WAIVES HIS OBJECTION TO CONDITIONS ATTACHED TO PERMITS RESULTING FROM AN ASSIGNMENT OF STATE-FILED APPLICATIONS, WHEN HE ELECTS TO RECEIVE SUCH AN ASSIGNMENT.

The United States argues that the conditions of Decision 1422 are invalid even as applied to permits based on assigned applications for water rights. U.S. Br. 149; Pet. Br. 70-73. Its argument is that the assignments were not "expressly" conditioned on the acceptance of state-imposed conditions. *Ibid.* In fact, the record indicates that the Secretary received the assignments in the expectation that he

would be subject to state-imposed conditions.[33] Moreover, there can be no doubt that the State Board, in approving the assignments, provided such approval on the assumption that the Secretary would be subject to conditions which the State Board attached to the resulting permits. If any such doubt remains, the matter must be remanded to the State Board, so that the Board can determine whether the assignments should be approved without the conditions. See *Federal Power Comm'n v. Idaho Power Co.*, 344 U.S. 17 (1952); *Bank of America v. State Water Resources Control Bd.*, 42 Cal.App.3d 198 (1974).

CONCLUSION

For the foregoing reasons, we respectfully urge that this Court reverse the lower decision, and enter judgment in favor of the petitioners. The Court should hold that the Secretary of the Interior is required to comply with state law in acquiring and using unappropriated water under the Reclamation Act of 1902, except to the extent that state law impairs the purposes of Congress' reclamation projects. Further, it should hold that the United States is barred, by the doctrine of finality of judgments, from

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33. In applying to the State Board for approval of the assignments, the Bureau agreed that the resulting permits "shall include the enumeration of conditions therein which in substance shall include all of the provisions of this article," and the article in turn provides that such permits shall be effective to the extent that the water "is used for a useful and beneficial purpose in conformity with this division of the [California] Water Code." App. II, 49, 57.

collaterally attacking the validity of the conditions of Decision 1422.

Respectfully submitted,

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Appendix 1

CONDITIONS OF DECISION 1422 (See page 55, supra)

1. CONDITIONS DEFERRING FULL IMPOUNDMENT.

Conditions nos. 1 and 2 authorize immediate impoundment for two project purposes (fish and wildlife protection, water quality control), and authorize the impounded waters to be used for the additional purposes of power and recreation. App. II, 33-34. The conditions defer the impoundment of water for consumptive (agricultural, municipal, industrial) purposes until the Bureau develops "firm commitments" for consumptive use, and satisfies the State Board that the "benefits" of its plan "outweigh any damage" to fish, wildlife and recreation in the upper Stanislaus basin. *Ibid.* The conditions also defer the additional impoundment of water for recreation and power purposes until the Bureau is authorized to impound additional waters for consumptive purposes. *Ibid.*

The United States argues that these conditions interfere with the congressional directive that the project be "initiated as expeditiously and prosecuted as vigorously" as possible, in that they "delay the expeditious realization" of the project benefits and prevent the project "from generating its full complement of revenue." U.S. Br. 64. However, as explained in our reply brief, any such delay in project benefits and revenue results from the Secretary's failure to develop a plan for consumptive use, not from the conditions that defer his rights to full impoundment until such a plan is developed. Pet. Rep. Br. 53.

The United States also argues that the conditions, by authorizing the State Board to "weigh" the "benefits" and "damage" of the Bureau's future water plan, enable the State Board to "determine whether purposes for which

Congress had authorized" the project "would be allowed to go forward." U.S. Br. 66. As explained in our reply brief, however, the State Board lacks such authority under section 8. Pet. Rep. Br. 54-55. If the conditions were construed as authorizing the State Board to deny water necessary to serve the congressionally-authorized purposes of the project, thus rendering the project economically infeasible, they would be overly broad. *Ibid.* To the extent that they permit the State to make determinations that do not conflict with express congressional determinations, they are within the power given to the State by section 8.

The United States also argues that the conditions impair the power purposes of the project. U.S. Br. 64. Our response to this argument is found in our reply brief. See Pet. Rep. Br. 54 n. 29.

2. CONDITIONS LIMITING OR CONTROLLING THE USE OF WATER.

Condition no. 4 requires a preference to be given to water users in the four counties which comprise the Stanislaus basin, App. II, 35, and condition no. 25 similarly requires a preference to be given to these four "counties of origin," *id.* at 40.

The United States argues that these conditions conflict with the congressional directive that the project shall be an "integral part" of the Central Valley Project, by preventing the Secretary from shipping project waters outside the Stanislaus basin. U.S. Br. 69. In fact, the conditions merely provide that the water shall be used in the Stanislaus basin until the Bureau develops a plan for consumptive use outside that basin, as required in conditions nos. 1 and 2. Moreover, the conditions are basically the same as the provision in the authorizing act providing a preference for

"existing and anticipated future needs" of the "Stanislaus River Basin." 76 Stat. 1191 (1962). The United States argues that the provision in the authorizing act vests the Secretary with exclusive authority to define the basin. U.S. Br. 69. However, the United States fails to show, or even argue, that the State Board has mis-defined the area. Indeed, the position which the United States now argues explicitly contradicts the position which it took in the hearings leading to Decision 1422. In those hearings, the Bureau's representative testified that the preference expressed in the authorizing act "specifically is for the water needs of the four counties." Df. Ex. 10, p. 145. Even after the State Board's decision, an objection to this condition was not raised in the Bureau's petition for rehearing. If the Secretary were, at a future time, able to show that the State Board has mis-defined the basin, such evidence should be offered to the State Board, so that it can change its conditions accordingly.

Conditions nos. 5 and 20 provide for interim maintenance of certain levels of water quality, based on levels which are contained in agreements between the Bureau and California agencies. App. II, 35-36. The United States argues that the conditions do not incorporate all provisions of the agreements, in that the agreements, unlike the conditions, provide for annual limitations on the amount of water released for such purposes. U.S. Br. 72. The conditions, however, mandate specific releases of only that amount which the Bureau recognized in its agreement as necessary for water quality. The State Board recognized, however, that the benefits to be achieved from such releases were dependent on the total dissolved solids (TDS) concentration in the released water; in other words, the benefits were dependent not only on the quantity but the *quality* of the

water. The State Board thus recognized that changes in water *quality* might require future larger release in order to achieve the same result; the requirement of further studies is directed to this point. Moreover, as the State Board noted, the failure of the Bureau to designate its place of use of the New Melones yield is the primary difficulty in determining the proper amount of releases. The Bureau's water quality expert testified to the State Board that "before the board could put any meaningful restrictions or permit terms on the Bureau, [the State Board] . . . would have to know where [the water] . . . is going to go." As he acknowledged, ". . . you can't make any predictions . . . about the effect of New Melones Dam on water quality in the lower San Joaquin until you know how the project is going to be operated and where the conservation yield is going to be used." Df. Ex. 10, pp. 247-248.

Most significantly, the United States does not, and cannot, argue that the conditions require the Bureau, in actual practice, to release more water than is provided in its agreements. Moreover, it is irrelevant whether the conditions precisely reflect the agreements. It is relevant only whether the conditions, under presently known facts, provide for proper levels of water quality control. The United States does not argue that, under presently known facts, the conditions provide for improper levels of water quality control; it could not so argue since the only releases now required reflect precisely the United States contractual agreement. It argues only that this is a matter within the exclusive discretion of the Secretary. Our response to that contention is set forth in our reply brief. See Pet. Rep. Br. 57.

Conditions nos. 5 and 20 also provide that the water quality levels provided therein may be modified, in accordance with any modification of the Water Quality Control

Plan for the San Joaquin Basin. App. II, 35-36, 39. The United States argues that this provision might enable the State Board, at a future time, to use "the full yield of the New Melones for water-quality purposes. . . ." U.S. Br. 74. As we note in our reply brief, such a result would render the project economically infeasible, and thus be beyond the authority of the State Board under section 8. Pet. Rep. Br. 55. Again, however, the effect of that reserved jurisdiction cannot properly be determined until the jurisdiction is actually exercised. See *Public Service Comm'n v. Wycoff Co.*, 344 U.S. 237 (1952); *Eccles v. Peoples Bank*, 333 U.S. 426 (1948); cf. *Kaiser Steel Corp. v. W. S. Ranch Co.*, 391 U.S. 593 (1968). We see no impediment simply in the reservation itself, especially where the inability to make a final determination is caused by the Bureau's own failure to develop firm alternative plans to the abandoned East Side Division.

3. CONDITIONS RESERVING JURISDICTION.

Condition no. 9 provides that the "maximum quantities stated herein may be reduced in the license if investigation warrants." App. II, 36. Condition no. 13 reserves the State Board's jurisdiction to regulate matters such as "method of diversion, method of use, and quantity of water diverted. . . ." App. II, 37. Condition no. 6 reserves jurisdiction for the purposes of establishing "dry year criteria," and of revising the conditions relating to water quality control releases and fish releases. App. II, 36.

The United States argues that these conditions enable the State Board to assert continuing jurisdiction over the project. U.S. Br. 75. However, if the State Board has jurisdiction to impose conditions, it obviously has jurisdiction to change its conditions on the basis of new infor-

mation. Otherwise, the State Board would be powerless to change conditions which have become anachronistic. As California's long historical experience has indicated, the proper management of water resources cannot be fixed as of a single moment, but depends on the circumstances of the time. *Joslin v. Marin Municipal Water District,* 67 Cal. 2d 132, 140 (1967). The United States' position would compel a contrary and unwise position, one which could not be responsive to changed circumstances.

The United States argues that, under these conditions, "all the purposes of the project that are dependent on water are affected, and there is no way for federal authorities to assure that those purposes are realized as Congress intended." U.S. Br. 78. However, we do not claim that the State Board has authority to adopt future conditions, under the conditions reserving jurisdiction, that prevent the achievement of multiple purposes of the project "as Congress intended." It cannot be determined here whether future conditions will be harmonious with project purposes, as authorized by Congress. That question can only be determined when, and if, the State Board adopts such future conditions.

4. CONDITIONS AFFECTING PROJECT CONSTRUCTION.

Conditions nos. 10 and 11 merely set a target date of December 1, 1980, for project completion, and December 1, 1990, for utilization of project water. App. II, 36. Their only purpose is to reflect the California statutory policy that an applicant should not be able to perpetually preserve an unused water right when the water might be otherwise beneficially used. Cal. Wat. Code §§ 1390, 1396, 1397. If the project is not completed within the time authorized, or its water not utilized within the time authorized, the Bureau can, of course, apply to the State Board for an alteration of the condition. Cal. Wat. Code § 1398. It cannot be imagined that the request would be denied, in light of the congressional directives of project purposes, and in the light of the substantial expenditure of federal funds for the project.

Condition no. 17 requires the Secretary to provide means to insure the release of waters which exceed those which the Bureau is now authorized to impound. App. II, 38. The United States argues that the outlet suggested by the State Board would affect project construction and design. It submits that the project, as planned, has no such outlet for insuring the release of such surplus waters. U.S. Br. 79. The United States pointedly fails to mention, however, that other methods can equally satisfy the condition; it does not claim an inability to meet the condition by means other than the suggested outlet pipe.

In any event, such a condition is necessary to protect the "beneficial use" of water, for otherwise the Secretary would be allowed to effectively impound more water than authorized in his permit. It hardly impairs the purposes or value of the project to require a means for the release of such waters.

Conditions no. 3 and 18 require the Bureau to clear the reservoir site of all "structures, trees, and other vegetation" that might impair the recreation purpose of the project, and "to show the manner in which clearing will progress as additional storage is authorized." App. II, 35, 38. The conditions thus seek only to facilitate achievement of the recreation purpose, and to protect the valuable resources of the upper reaches of the Stanislaus until full impoundment requires inundation. The conditions thus only reflect the concerns expressed in the conditions nos. 1 and 2, which defer full impoundment.

5. CONDITIONS IMPOSING REPORTING REQUIREMENTS.

Conditions nos. 3, 7, 8 and 12 require the Secretary to make periodic reports to the State Board, so that the Board can determine whether the permit conditions are being met. App. II, 34-35, 36. The United States argues that the requirements may lead to the necessity for further congressional appropriations. U.S. Br. 80. We find it difficult to credit the United States' assertion that the material in those reports would not otherwise be maintained by the Bureau as a matter of normal operating procedures. In any event, the cost of such reports would be an insignificant portion of the project, and thus the conditions do not have a substantial effect on project operations.

6. CONDITIONS REQUIRING PROJECT ACCESS.

Conditions nos. 15 and 16 provide for access to the project by the State Board so that the Board can insure that the permit conditions are being met, and for regulated access to the project by members of the public for fishing. App. II, 37-38. The United States argues that these conditions impinge on the Secretary's operational authority, and may affect security. U.S. Br. 82. However, the conditions are well within the State Board's power under California law to ensure the most beneficial uses of the impounded water. *Bank of America v. State Water Resources Control Board*, 42 Cal. App. 3d 198 (1974). They impose only minor obligations on the Bureau, and do not substantially affect the way in which it plans to operate the project.

Appendix 2

U.S. BUREAU OF RECLAMATION, "RECLAMATION INSTRUCTIONS"

Series 110 Project Planning

Part 116 Economic Investigations

CHAPTER 3 PROJECT FORMULATION

§ 116.3.1

INTRODUCTION

1. *Definition.* Project formulation is the process of selecting the purposes to be served, the physical means of development, and the size of the facilities and service area to be included in a project plan.

2. *Objectives.* The general objective of project formulation is to promote efficient development and utilization of water and land resources by means of engineering works. The structures are designed to alter the amount, time, and place of use for water resources, with the further objective of promoting economic growth and stability as a means for improving the quality of living conditions.

3. *Framework of Law and Policy.* State and Federal law and policy establish the framework for project formulation. Project plans must comply with State legal provisions or priorities for beneficial use of water, interstate water compacts, court decrees allocating water among States, water rights, and related matters. Project plans must also comply with Federal laws and policies, including a demonstration that anticipated project revenues are sufficient to cover reimbursable costs. In some cases, court decrees, State laws, and Federal policies have been modified to meet specific conditions in the authorization of particular projects.

4. *Viewpoint.* Formulation of project plans requires a viewpoint consistent with the national objectives of resource development. The engineering features are designed to provide economic and social gains of public significance, in contrast to works intended for the limited purpose of maximizing financial profit, rates of return on investment, or direct benefits alone. Thus, the comparison of revenues and costs used as a test of economic feasibility is not a sufficient basis for the formulation of project plans. The more comprehensive benefit-cost comparison, embracing indirect benefits and nonreimbursable purposes, constitutes one of the principal tools of project formulation consistent with national objectives.

5. *Basic Concept.* A properly formulated project is one in which each purpose or major segment will provide benefits at least equal to its cost. A major segment is an increment of size or use which can practically be added to or omitted from the project plan. An incremental analysis shall be made to test the advantages and disadvantages of such variations and to ensure selection of the most desirable plan. This process of formulation can be applied to plans of development for geographic or economic regions, river basins or tributary watersheds, projects or subdivisions of projects, and to reconnaissance or detailed investigations.

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Series 230 Irrigation O&M

Part 231 Policy and Basic Requirements

CHAPTER 5 RIVER REGULATION

§ 231.5.1

1. *Authority.* The Reclamation Act recognizes the interests and rights of the States in the utilization and control of their water resources and requires the Bureau, in carrying out provisions of the Act, to proceed in conformity with State water laws. Since the construction of a reservoir and

the subsequent storage and release of water for beneficial purposes normally entails stream regulation, it is necessary to reach an understanding with the States regarding reservoir operating limitations. Formalized argeements with the States and also with other agencies, both public and private, are desirable wherever the intricacy of established water rights, compacts, and other agreements require clarification or establishment of criteria within which river regulation can be accomplished. Proposed agreements which involve multipurpose operations, before formal submission to persons or agencies outside the Bureau should be reviewed by the Assistant Commissioner and Chief Engineer for technical adequacy.

2. *Coordination.* In varying degrees, the river regulation functions cut across established lines involving project investigations, power operations, and irrigation operations personnel. Design and construction personnel also have an interest with respect to their responsibilities for design of projects to meet operational requirements both during and subsequent to construction, for inspection of major structures and facilities, and for design of contract administration for major changes and repairs. During the planning and construction periods, project investigations personnel shall be responsible for sponsoring and coordinating the Bureau's river regulation function, both internally and externally. Upon the works being placed in operation and maintenance status, this responsibility shall pass to the irrigation operations and power operations personnel in keeping with their related interests. However, the Division of Project Investigations in the Commissioner's Office, Denver, will continue to provide technical advice and assistance in river regulation and water supply forecast matters. Whenever a consideration, either of new developments in a

partially developed basin or changes in purpose of utilization of the water resources in a fully developed basin, is required, the primary responsibility for the performance of such project planning investigations, to be conducted in collaboration with the appropriate irrigation or power operations personnel, or both, shall rest with project investigations personnel.

3. *Organization.* River storage and water utilization systems shall be operated subject to directives from a responsible operating official. The size and character of his organization will vary with conditions. River regulation units will be necessary when operations are extensive. Establishment of river regulation units shall be subject to the approval of the Commissioner upon the recommendation of the Regional Director, concurred in by the Assistant Commissioner and Chief Engineer.